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## A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform

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# ***SYMPOSIUM: CHANGING SCHOOLS***

## **A PUBLIC LABORATORY DEWEY BARELY IMAGINED: THE EMERGING MODEL OF SCHOOL GOVERNANCE AND LEGAL REFORM**

JAMES S. LIEBMAN\* & CHARLES F. SABEL†‡

|  |     |
|--|-----|
| Introduction.....  | 184 |
| I. The Cycle of Court-Centric Reform and its Limits .....  | 192 |
| A. School Desegregation .....  | 195 |
| B. Equitable Funding .....   | 201 |
| II. Standards, Learning Communities and the New Accountability. ....                               | 207 |
| A. Top-Down Reform: Standards, State and Federal .....   | 207 |
| B. Bottom-Up Reform: From the School as Teachers' Cooperative .....                                | 213 |
| 1. Networks and Small Schools:<br>The Professional Collegium .....                                 | 213 |
| 2. Towards the District as an Accountable<br>Learning Community: Community School District 2 ..... | 216 |
| C. Synthesis: The New Accountability.....  | 229 |
| III. Two Case Studies of the New Accountability in Practice:                                       |     |
| Texas and Kentucky. ....   | 231 |
| A. Texas.....  | 232 |
| 1. History.....  | 233 |
| 2. Operation.....  | 239 |
| B. Kentucky.....   | 250 |
| 1. History.....  | 250 |
| 2. Operation.....  | 257 |
| IV. Why the Collective Action Works: Some First Notes on   |     |
| Politics in the Age of Non-Court-Centric Judicial Review.....                                      | 266 |
| A. New Publics .....   | 266 |
| B. The New Meaning of Judicial Review.....   | 278 |

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## V. The Federal Role in the Reform of Public Education:

|   |     |
|---|-----|
| The No Child Left Behind Act and its Implications ..... | 283 |
| Conclusion .....  | 300 |

## INTRODUCTION

The American public school system is in the midst of a vast and promising reform. The core architectural principle of the emergent system is the grant by higher-level authorities—federal government, states, and school districts—to lower level ones of autonomy to pursue the broad goal of improving education. In return, the local entities—schools, districts, and states—provide the higher ones with detailed information about their goals, how they intend to pursue them, and how their performance measures against their expectations. The core substantive commitment of the emergent system is the provision to all students, and particularly to racial and other minorities whom the public schools have traditionally short-changed, of an adequate education, where the definition of adequacy is continuously revised in the light of the improving performance of the best schools. The reform seeks an education that builds on the curiosity and needs of diverse students and uses the whole school system as a vast laboratory to determine how best to achieve this end. If it succeeds, it will attain on a national scale enduringly the goals that John Dewey's famous Laboratory School in Chicago was able to approximate for roughly a hundred students for a few years.<sup>1</sup>

The reform grows out of and contributes to a new form of collaboration among courts, legislatures, and administrative agencies on the one side and between these organs of government and new forms of public action on the other. It thus redefines the separation of powers and recasts the administrative state more generally, while opening the way to new forms of citizen participation in the orientation and operation of key public institutions. At the limit, school reform raises the prospect of a broader redefinition of our very democracy.

The sad history of education in the last fifty years, and particularly the troubled efforts to improve public education in its closing decades, invites an incredulous reaction to such claims. For most of the twentieth century, administrators—local, state, then federal—tried to control classroom behavior through uniform rules and hierarchy.<sup>2</sup> Teachers retained significant autonomy over their

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1. See, e.g., JOHN DEWEY, *A Pedagogical Experiment*, in 5 THE EARLY WORKS OF JOHN DEWEY, 1882–1898, at 245 (Jo Ann Boydston ed., 1972); JOHN DEWEY, *The School and Society*, in 1 THE MIDDLE WORKS, 1899–1924, at 44 (Jo Ann Boydston ed., 1976); JOHN DEWEY, *The University School*, in 5 THE EARLY WORKS OF JOHN DEWEY, 1882–1898, *supra*, at 436 app. See also ELLEN CONDLIFFE LAGEMANN, *AN ELUSIVE SCIENCE: THE TROUBLING HISTORY OF EDUCATION RESEARCH* 47–56 (2000).

2. See LARRY CUBAN, *HOW TEACHERS TAUGHT: CONSTANCY AND CHANGE IN AMERICAN*

day-to-day activities, but only at the high cost of using standard textbooks and regimenting students in accordance with administrative precept.<sup>3</sup> Periodic efforts to introduce what could very broadly be conceived as Deweyite reforms or otherwise to assist at-risk students left traces in individual classrooms and schools.<sup>4</sup> But they changed next to nothing at the higher levels of the school administration or at the leading institutions that trained school administrators.<sup>5</sup>

If this stalemate demonstrated the limited reform capacities of state legislatures and district and state school administrations, the spotty successes of school desegregation and school finance-equity suits revealed the judiciary's modest capacity to compensate directly for defects of the other branches. As the United States Supreme Court recognized this and absented itself from school reform efforts in the 1970s and 1980s, advocates sought to redress the inequities of American schooling at the state level.<sup>6</sup> There, too, judicial findings of liability seldom translated into actual improvements in schooling. Judges in many states found wide disparities in per pupil expenditures between rich and poor districts to be inconsistent with state constitutional equal protection provisions or with state constitutional guarantees of "an efficient education." But substantial court-ordered redistribution of public funding for education sometimes reduced overall state spending on schools: equalizing down. It nearly always triggered protracted acrimony between state legislatures and courts.<sup>7</sup>

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CLASSROOMS, 1890–1990 (1993); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 126–76 (1974); Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 139, 140–52 (2000) (discussing the evolution of "one size fits all" public schools in the United States and arguing that this "factory model" departs from democratic ideals).

3. See DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* 85–109 (1995).

4. See CUBAN, *supra* note 2, at 61 ("No more than an estimated one of four elementary teachers, and even a lesser fraction of high school teachers, adopted progressive teaching practices, defined broadly, and used them to varying degrees in their classrooms.").

5. See LAGEMANN, *supra* note 1, at 60–63.

6. See, e.g., William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 722–23 (1992); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1151–53 (1995); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality*, 112 HARV. L. REV. 1131, 1186–91 (1999); Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 507 (1991); Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *LAW AND SCHOOL REFORM* 88, 89–90 (Jay R. Heubert ed., 1999); Michael A. Rebell, *Education Adequacy, Democracy and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY* 218, 232–39, 252–53 nn.53–54 (Timothy Ready et al. eds., 2002); Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 498–502 (1995); *infra* notes 77–107 and accompanying text.

7. See McUsic, *supra* note 6, at 105 ("What successful school finance suits have failed to do however is translate success in the courtroom into success in the classroom. Instead, often after prolonged and bruising legislative battles, a somewhat more equitable funding system is devised, but for a variety of reasons even this system does not result in measurably greater educational achievement for low-income students. Ironically, it appears that the more plaintiffs succeed in



From the 1980s onward the performance of the school system deteriorated both in international comparison and as measured against the needs of an ever more knowledge-intensive economy.<sup>8</sup> Poor and African-American communities were embittered by the failures of desegregation and finance-equity reform.<sup>9</sup> Frustration with the public schools gave rise to a ferocious debate between those who would improve existing school systems, locally based in theory but bureaucratically organized in fact, and those who would replace public schools with privately controlled ones.<sup>10</sup> Advocates of public schools argued that shortcomings could ultimately be traced to failures of political will that had thwarted successive reform efforts in the courts and legislatures. If the public would dedicate the resources to integrate white and black children, reduce class size, add specialized programs, or simply increase federal funding, public schools would work for all.<sup>11</sup> In contrast, advocates of privatization maintained that public control always invites self-dealing by entrenched interests. That selfishness explains why public schools inevitably waste the resources they have. Provision of more only encourages further profligacy. The only remedy from this point of view is privatization.<sup>12</sup>

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weaning the school funding system from its dependence on local property taxes, the less money will be spent overall on education.”); Douglas S. Reed, *The People v. the Court: School Finance Reform and the New Jersey Supreme Court*, 4 CORNELL J.L. & PUB. POL’Y 137, 172 (1994); *infra* notes 219–47 and accompanying text.

8. See ERIC A. HANUSHEK, MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS 39–48 (1994).

9. See PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 64–65 (1994) (characterizing the voucher movement as, in part, a “poor people’s revolt”); JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA’S FIRST VOUCHER PROGRAM (2000); Scott S. Greenberger, *Many Blacks Seek Choice of Schools*, BOSTON GLOBE, Feb. 26, 2001, at B5 (citing poll showing that fifty-seven percent of African-Americans support vouchers, compared to forty-nine percent of the general population). See also Robert Berne, *Educational Input and Outcome Inequities in New York State*, in OUTCOME EQUITY IN EDUCATION 1, 12–21 (Robert Berne & Lawrence O. Picus eds., 1994).

10. See, e.g., 1 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE THEORY OF CHOICE AND CONTROL IN AMERICAN EDUCATION (William H. Clune & John F. Witte eds., 1990); 2 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE PRACTICE OF CHOICE, DECENTRALIZATION AND SCHOOL RESTRUCTURING IN AMERICAN EDUCATION (William H. Clune & John F. Witte eds., 1990); HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION (Helen F. Ladd ed., 1996).

11. See, e.g., JONATHON KOZOL, SAVAGE INEQUALITIES (1991); articles collected in LAW AND SCHOOL REFORM, *supra* note 6.

12. See, e.g., JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA’S SCHOOLS (1990); JOHN COONS & STEPHEN SUGARMAN, EDUCATION BY CHOICE (1978); MYRON LIEBERMAN, PRIVATIZATION AND SCHOOL CHOICE (1989); LEARNING FROM SCHOOL CHOICE (Paul E. Peterson & Brian C. Hassel eds., 1998); SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW (Stephen D. Sugarman & Frank R. Kemerer eds., 1999); Jay P. Greene et al., *Effectiveness of School Choice: The Milwaukee Experiment*, 31 EDUC. & URB. SOC. 190 (1999). Broadened educational markets might be achieved by the contractual transfer of control of public schools to private management companies. See, e.g., Paul T. Hill et al., REINVENTING PUBLIC EDUCATION: HOW CONTRACTING CAN TRANSFORM AMERICA’S SCHOOLS (1997). Or it might occur by expanding enrollments in private and parochial schools through tax subsidies for the tuition payments of pupils otherwise unable to afford private education. See, e.g., CHUBB & MOE, *supra*; MILTON FRIEDMAN,

This debate, too, is stalemated. School-management companies have repeatedly failed to fulfill their contracts with public authorities, leaving the advocates of privatization without evidence that private schools can outperform public institutions without handpicking their students.<sup>13</sup> Court-ordered redistribution of state financing mechanisms have seldom met the plaintiffs' expectations that more spending on education by itself produces better schools.<sup>14</sup> These failures weigh heavily against the claim that privatization is a necessary and sufficient condition for educational reform and the contrary conviction that better schools spring from political will.

As these disappointments dimmed prospects for better public schools, however, a new and promising model of school governance was arising out of two apparently contradictory clusters of piecemeal reforms, each only loosely connected to the large choices that have long framed public debate.<sup>15</sup> The first cluster went in the direction of increased centralization, even nationalization, of the public school system. Its central element was a drive to set minimum standards for school and student performance at the state and federal level; to rank pupils and schools accordingly; and to deny promotion and diplomas to students and to reconstitute schools that persistently failed to meet the new requirements.<sup>16</sup> Advocates of such "high-stakes testing" believed the penalties of failure were sufficient to force individuals and institutions to improve their

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CAPITALISM AND FREEDOM (1962); Paul E. Peterson & William G. Howell, *When Low-Income Students Move from Public to Private Schools*, in CITY SCHOOLS: LESSONS FROM NEW YORK 339 (Diane Ravitch & Joseph P. Viteritti eds., 2000) [hereinafter CITY SCHOOLS].

13. Reasons for doubting the economic viability of private management of public schools are discussed in Henry M. Levin, *Potential of For-Profit Schools for Educational Reform*, (National Center for the Study of Privitization in Education Occasional Paper No. 47, 2001), available at [http://www.ncspe.org/publications\\_files/179\\_OP47.pdf](http://www.ncspe.org/publications_files/179_OP47.pdf) (questioning whether there is a sound basis for expecting for-profit schools to achieve the economies of scale needed to make them succeed economically) and Henry M. Levin & Cyrus E. Driver, *Costs of an Educational Voucher System*, 5 EDUCATION ECONOMICS 303–311 (1997) (stating that school choice on a national scale will entail extensive administrative and other services significantly increasing costs).

14. See *infra* notes 95–97 and accompanying text.

15. See, e.g., CHUBB & MOE, *supra* note 12, at 194–201 (identifying bureaucratizing and localizing trends and claiming that their contradictory impulses doom reform efforts within public educational institutions); Ravitch & Viteritti, *Introduction* to CITY SCHOOLS, *supra* note 12, at 8 (noting same contradiction in context of particular reforms in New York City public schools).

16. See, e.g., DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* 408–52 (2000); Amy R. Argetsinger, *State Plans School Takeovers; Education Officials Looking to Baltimore for First Targets*, WASH. POST, Jan. 5, 2000, at B9; Rochelle Carter, *School Watch: No Stranger to Change, New Superintendent in Step with Predecessors' Moves*, ATLANTA CONST., July 1, 1999, at JD8 (discussing Atlanta School Superintendent's policy of taking over and reconstituting poorly performing schools); B. G. Gregg, *State Plans Second School Takeover*, DETROIT NEWS, Feb. 11, 2000, at C1 (reporting that the State of Michigan is considering takeover of Benton Harbor School District, after taking responsibility for restructuring Detroit school systems); Lori Olszewski, *School District Takeovers Take Off: Oakland Effort Follows U.S. Educational Trend*, S.F. CHRON., Apr. 14, 1999, at A17 (reporting on proposed legislation giving Oakland mayor responsibility for distressed schools). See also Aaron Singer, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830 (1999) (proposing reform strategy based on states' power to disestablish entire school districts).

performance.<sup>17</sup>

The second cluster of reforms went in the direction of a new localism. It aimed to devolve authority for classroom instruction away from state education administrations and towards districts, principals, teachers—especially those professionally mortified by the rigidities of the traditional system—and sometimes parents. Other elements were an increased willingness by educational authorities to allow teachers and parents to create new schools within the public system, particularly small and specialized ones, and increased acceptance of a parent's right to choose to send his or her child to a school outside the assigned catchment area.<sup>18</sup>

As these reforms intersected, they changed in complementary ways. High-stakes testing turned out to be an unreliable measure of the performance of individuals or institutions. It often created perverse incentives—to teach to the test, or to exclude from the testing pool the students most in need of help. It unfairly penalized students (particularly poor and minority students) for the failings of institutions over which they had no control.<sup>19</sup> Above all, the test

17. By high-stakes tests, which are to be distinguished from the diagnostic accountability schemes that are the focus of this Article, we mean "tests that states and school districts use in deciding whether individual students will receive high-school diplomas or be promoted to the next grade." Jay P. Heubert, *High-Stakes Testing in a Changing Environment: Disparate Impact, Opportunity to Learn, and Current Legal Protections* 1 (2002) (draft manuscript, on file with NYU Review of Law & Social Change); see *infra* notes 124–27 (distinguishing high-stakes testing and the diagnostic uses of assessments). For a careful examination of high-stakes testing regimes, see Jay P. Heubert, *High-Stakes Testing and Civil Rights: Standards of Appropriate Test Use and a Strategy for Enforcing Them*, in *RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION* 179, 179–94 (Gary Orfield & Mindy L. Kornhaber eds., 2001) [hereinafter *RAISING STANDARDS OR RAISING BARRIERS?*].

18. See, e.g., Jane L. David, *School-Based Decision Making: Kentucky's Test of Decentralization*, 75 *PHI DELTA KAPPAN* 706 (1994); Sharon Elder, *The Power of the Parent: James Comer is Proving that Family Involvement Is a Potent Antidote to Drugs and Guns in the Nation's Schools*, *YALE ALUMNI MAG.*, Oct. 1990, at 50; Pearl Rock Kane, *The Difference Between Charter Schools and Charterlike Schools*, in *CITY SCHOOLS*, *supra* note 12, at 65; Tom Loveless & Claudia Jasin, *Starting from Scratch: Political and Organizational Challenges Facing Charter Schools*, 34 *EDUC. ADMIN. Q.* 9, 9–30 (1998) (concluding that eight Massachusetts charter schools under study typically began as informal organizations with scanty resources and had substantial difficulty converting the early endeavors to robust institutions with stable relations to the states); O'Brien, *supra* note 2, at 152–74 (discussing trend towards, and reform goals of, charter schools); Mary O'Connell, *School Reform Chicago Style: How Citizens Organized to Change Public Policy*, a special issue of *THE NEIGHBORHOOD WORKS*, Spring 1991; Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 *TUL. L. REV.* 563, 574–80 (2001) (discussing distinguishing characteristics and procedures generally used to establish charter schools); Priscilla Wohlstetter & Noelle Griffin, *Creating and Sustaining Learning Communities: Early Lessons from Charter Schools* (Consortium for Pol'y Research in Educ., Occasional Paper Series, OP-03, 1998).

19. See, e.g., ALFIE KOHN, *THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS* 40 (2000); LINDA C. MCNEIL, *CONTRADICTIONS OF SCHOOL REFORM: EDUCATIONAL COSTS OF STANDARDIZED TESTING* 153–271 (2000); SUSAN OHANIAN, *ONE SIZE FITS FEW: THE FOLLY OF EDUCATIONAL STANDARDS* 1–127 (1999); NAT'L RESEARCH COUNCIL, *HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION* 178–79 (Jay P. Heubert & Robert M. Hauser eds., 1999) [hereinafter *HIGH STAKES*]; J.J. Cannell, *Nationally Normed Elementary Achievement Testing in America's Public Schools: How All Fifty States Are Above the National*

results gave little or no indication of how to reorganize failing institutions or aid students who did not measure up. In response to these criticisms, a new class of diagnostic standards emerged with the express aim of using tests both to direct local reform and to orient pedagogic attention to individual students.<sup>20</sup>

The new localism contributed to the development of these diagnostic standards and pioneered methods of using the disaggregated testing data as a tool of self-assessment. In so doing, the movement for professional regeneration became accountable for ensuring not only that teachers taught well but also that students actually learned. Practitioners also came to see that accountable professionalism required new forms of peer monitoring.<sup>21</sup>

At its best this recombination of local initiative and diagnostic standards turns the traditional school topsy-turvy. The teacher no longer executes instructions set at the state or district level, but rather monitors the learning strategies of individual students and helps them correct difficulties as they arise. The principal assures that classrooms in his or her school can be organized in this way. The superintendent provides the conditions that principals need to succeed at that task. The state no longer writes detailed rules and regulations for the operation of schools and districts but sets and periodically revises school standards and the means for assessing them, aids schools struggling to improve, and reconstitutes those that are unable to do so.

The emergent structure is not, however, a hybrid of traditional hierarchy and economic or political markets. In a hierarchy, there is a clear distinction between the superiors who set the rules and the subordinates who execute them.<sup>22</sup> In school systems reformed on the principles we discuss below, rules are provisional frameworks for action and are corrected at the urging of “subordinates” in light of their experience “implementing” them: Ends are revised in light of means and vice versa. Markets in theory know neither superiors nor subordinates. They operate by purely voluntary expressions of preference. Sellers adjust their behavior in response to buyers’ decisions; officials react to their constituents’ votes. In schools reforming along the lines adumbrated here, on the contrary, service providers at all levels respond to continuing comparisons of their performance with that of their peers, where the dimensions of the comparison and the definition of “peer” are themselves subject to discussion and revision.<sup>23</sup>

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*Average*, 7 EDUC. MEASUREMENT: ISSUES & PRAC. 5 (1988); M. Gail Jones et al., *The Impact of High-Stakes Testing on Teachers and Students in North Carolina*, 81 PHI DELTA KAPPAN 199 (1999); Linda McNeil & Angela Valenzuela, in RAISING STANDARDS OR RAISING BARRIERS, *supra* note 17, at 127; D. Monty Neill & Noe J. Medina, *Standardized Testing: Harmful to Educational Health*, 70 PHI DELTA KAPPAN 688, 689–92 (1989).

20. See *infra* notes 162–68 and accompanying text.

21. See *infra* notes 169–72 and accompanying text.

22. See, e.g., MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATIONS* 329–41 (A. H. Henderson trans. & Talcott Parsons ed. & trans., Oxford Univ. Press 1947).

23. This routine questioning of institutional processes that results from the continuing revision of means and ends in the light of comparative assessment of performance is observable

The federal No Child Left Behind Act of 2001 ("NCLB")<sup>24</sup> requires states to adopt a general accountability scheme of this sort as a condition for receiving federal funds for education. The wide bipartisan support for this complex legislation<sup>25</sup> is a measure of the extent to which the familiar contest between more market or more state diverted attention—legal and otherwise—forms the actual course and possibilities of renewal of the schools. Indeed, agreement on the broad outlines of the NCLB's reform agenda was so deep and widespread that participants and commentators oscillated after its passage between wondering how deep antagonisms could have evaporated overnight and doubting that the old debates reflected deep disagreements at all.<sup>26</sup>

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today in other contexts, as different as environmental regulation and community policing, where the problems for public action have much in common with the problems of school reform. See, e.g., CHARLES F. SABEL, ARCHON FUNG & BRADLEY KARKKAINEN, *BEYOND BACKYARD ENVIRONMENTALISM* (Beacon Press, 2000); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000) (discussing recent innovations in the use of court-monitored treatment plans for drug-addicted offenders); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (2000) (exploring the uses of community-based planning and monitoring as a method of managing police discretion). For other examples, see ARCHON FUNG ET AL., *CAN WE PUT AN END TO SWEATSHOPS?* (2001) (advocating a system of third party-monitored self-monitoring of overseas working conditions by corporations operating global supply chains); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing the potential role of democratic experimentalism in resolving difficult questions of constitutional interpretation); Brandon L. Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001) (advocating a system of monitored information collection, sharing, and comparison among police departments as a means of combating racial profiling); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001) (proposing the systematic use of performance monitoring and benchmarking as regulatory tools in the environment and other areas); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Environmental Performance*, 102 COLUM. L. REV. 903 (2002) (suggesting that NEPA be retooled as a mechanism for progressively redefining government projects to moderate their environmental effects to the extent currently possible); James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (advocating a multi-tiered and interactive "regulatory" framework for use by trial courts in managing the compliance process in employment discrimination lawsuits); CHARLES F. SABEL & WILLIAM SIMON, *DESTABILIZATION RIGHTS: HOW THE NEW PUBLIC LAW SUCCEEDS* (forthcoming 2003). For a general overview, see WILLIAM H. SIMON, *SOLVING PROBLEMS V. CLAIMING RIGHTS: THE PRAGMATIST CHALLENGE TO LEGAL LIBERALISM* (forthcoming 2003) (describing a new school of pragmatist thought that advocates carefully monitored problem-solving, instead of the announcement and enforcement of fixed entitlements, as the most effective means of reforming social institutions and responding to the needs of disadvantaged communities).

24. Pub. L. No. 107-110, 115 Stat. 1425 (2001).

25. For an interesting discussion of the new thinking that went into the NCLB, see Ronald Brownstein, *Bush Moves to Reposition Republicans on Education*, L.A. TIMES, Jan. 24, 2001, at A12; other articles cited *infra* note 27.

26. See, e.g., Brownstein, *supra* note 25; Sue Kirchhoff, *Federal Role Is Switch in GOP Policy*, BOSTON GLOBE, Jan. 24, 2001, at A1; Jodi Wilgoren, *Education Plan by Bush Shows New Consensus*, N.Y. TIMES, Jan. 23, 2001, at A1. See also Ronald Brownstein, *For a Start, Education Reform Offers Bush a Policy Path of Least Resistance*, L.A. TIMES, Dec. 18, 2000, at A5 ("What

The aim of this Article is precisely to rethink legal strategies for reforming the public schools in light of these unanticipated developments and the possibilities they reveal. Our intent is at once explanatory and programmatic. In Part I, focusing on desegregation and school finance litigation, we trace two successive reform cycles in which courts first determined to conform existing institutions to constitutional values, recognized the limits of doctrinally directed interventions, and, disheartened, abandoned their original ameliorative ambitions in order to defend the integrity of the judiciary. We will see, however, that at the end of both cycles, and especially in connection with recent litigation asserting a broad right to an “adequate” education, courts collaborated with nonjudicial actors to give substance to their understanding of constitutional obligations and remedies.

Part II traces the top-down movement for standards-based reform and the bottom-up movement of professional protest in favor of new classroom practices. Focusing on New York City’s School District 2, Part II shows how educators fused elements of both movements into the “New Accountability” in the mid-1990s. In Part III, we detail yet more comprehensive reforms in Texas and Kentucky to show how they link change in the classroom and new forms of administrative oversight, and to illustrate the reforms’ accomplishments so far.

Some readers may suspect that the disentanglement of interests and other transformations described in Parts II and III magically suspend iron laws of politics and the fundamental limits of collective action.<sup>27</sup> But we argue in Part IV that this suspicion overlooks the possibilities for innovative public action that arise when the parties exhaust familiar programmatic solutions and yet still face urgent requirements for action. We argue that educational reform succeeded in Texas and Kentucky because of explicit alliances that ignored traditional ideological and institutional divisions in favor of an incremental, but cumulatively transformative, exploration of solutions lying between top-down standards and bottom-up school-based reforms.

Part IV ends by considering the role of the courts in creating these new publics and reformed school systems. We take as a central lesson of the emerging school reforms that neither the separation of powers, the traditional forms of regulation associated with it, nor even the fundamental distinctions between the public and private and the political and the technical can today be assumed. On the contrary, the process of continuing regulatory adjustment requires such profound institutional renovation and such extensive participation in public decision-making that the distinction between public and private collapses. For their part, the courts seem to have stumbled upon a way to realize their virtues as disentrenching institutions, exposing encrusted inequalities through

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would an education compromise between Bush and centrist Democrats look like? It would start with Bush’s top education priority: a restructuring of federal education programs that offered states a trade of flexibility for accountability.”).

27. See, e.g., James Traub, *What No School Can Do*, N.Y. TIMES MAG., Jan. 16, 2000, at 52; *infra* notes 368–70.

public and constitutional scrutiny, without, however, directly administering the positive reforms that they have proved unable to command successfully. These latter developments suggest the possibility of a non-court-centric form of judicial review that preserves the capacity for constitutional deliberation as a form of reflection on the deepest norms of the political community, while substantially lessening the intrusiveness of the judiciary and so tempering the counter-majoritarian dilemma.

Part V considers the capacity of the federal No Child Left Behind Act to create enforceable assurances of improved educational outcomes for poor and minority children. We claim that the NCLB is neither a Trojan horse for privatization nor for deregulation of federal funding to poor and minority students. Although the NCLB taxes the capacity of states to build effective governance systems and of schools to meet the ensuing obligations, we argue that the NCLB is unlikely to crush reform at either the state or school level. To the contrary, based on experience to date, we argue that new accountability framework can trigger a race to the top. It does this both by facilitating exchanges of experience among states that are already reforming their school systems rapidly and by exposing laggards to political reprisals by an aggrieved well-informed citizenry. We argue as well that, despite serious limitations, the NCLB can aid the losers in this race by reviving and redirecting community-based and litigation strategies pioneered by the Civil Rights movement. In combination, the race to the top, political mobilization and corresponding litigation strategies may correct the serious limitations in federal enforcement in the current legislation.

By way of conclusion, we argue that the new reform can be seen as a legitimate legatee of the movement for desegregation of the schools.

# I.

## THE CYCLE OF COURT-CENTRIC REFORM AND ITS LIMITS

During the last half century, educational reformers have used the courts and the law to pursue racial justice and better schools.<sup>28</sup> Assessments of their impact diverge wildly.<sup>29</sup> For those, mainly on the left, who see the courts' intervention as a substantial success, law-driven reforms were single-handedly responsible for ending state-sponsored racial segregation of the schools from South Carolina to Seattle in the quarter century after *Brown v. Board of Education*.<sup>30</sup> Later judicial

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28. See generally articles collected in LAW & SCHOOL REFORM, *supra* note 6.

29. For more optimistic views, see for example LAW & SCHOOL REFORM, *supra* note 6; JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984); MICHAEL A. REBELL & ARTHUR R. BLOCH, EDUCATIONAL POLICY MAKING AND THE COURTS (1986); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1614-35 (1990). For more pessimistic views, see, for example, CHUBB & MOE, *supra* note 12, at 6; LINO GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976); DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

30. See, e.g., HOCHSCHILD, *supra* note 29, at 26-34, 46-70, 177-90; GARY ORFIELD, PUBLIC

interventions were also crucially responsible for equalizing the monetary support for poor and rich schools from Connecticut to California.<sup>31</sup> From this vantage point, the failing of court-driven reform was that it didn't go far enough. Judges lacked the courage of office to apply principles they embraced with the rigor required to make reform extensive and deep enough to be self-reinforcing.<sup>32</sup>

Observers, mainly on the right, who see the courts' intervention as instead a substantial failure, point chiefly to two aspects of the record. First, high and (since 1980) increasing proportions of African-American and Latino children are attending schools with few or no white children.<sup>33</sup> Second, even in states where judicially sponsored reform resulted in higher and increasingly equal funding for all public school students, the educational performance of poor and minority children is still far below that of white and Asian-American children.<sup>34</sup> From this point of view, the failures grew directly out of the courts' disregard for their institutional competence as defined by the constitutional separation of powers.<sup>35</sup> By presuming to supplant the political branches, or (in later versions) by intruding into spheres more properly left to private ordering, the courts encouraged a poisonous mixture of bureaucratization and political and racial polarization of American public education that thwarted the reformers' own program.<sup>36</sup> The courts' retreat was thus seen not as a failure of nerve but as a renewed respect for the separation of powers.<sup>37</sup>

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SCHOOL DESEGREGATION IN THE UNITED STATES, 1968–1980, 1–12 (1983); Willis Hawley & Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in *ELIMINATING RACISM: PROFILES IN CONTROVERSY* 281, 289 (Phyllis A. Katz & Dalmás A. Taylor eds., 1988); David R. James, *City Limits on Racial Equality: The Effects of City-Suburb Boundaries on Public-School Desegregation, 1968–1976*, 54 AM. SOC. REV. 963, 974–82 (1989).

31. See, e.g., Rebell, *supra* note 6, at 226–28 & n.53.

32. See, e.g., HOCHSCHILD, *supra* note 29, at 146–205; James, *supra* note 30; Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in *LAW AND SCHOOL REFORM*, *supra* note 6, at 39–83; Gary Orfield, *Turning Back to Desegregation*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 1–22 (Gary Orfield et al. eds., 1996).

33. See, e.g., DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 163–210, 221 (1995); David J. Armor, *After Busing: Education and Choice*, PUB. INTEREST, Spring 1989, at 24–27; John E. Coons, *School Choice as Simple Justice*, FIRST THINGS, Apr. 1992, at 15; Pierre DeVise, *Integration in Chicago Forty Years After Brown*, 15 URB. GEOG. 454 (1994); Catherine F. Dwyer & Christopher J. Sutton, *Brown Plus Forty: The Denver Experience*, 15 URB. GEOG. 421 (1994).

34. See, e.g., Berne, *supra* note 9, at 12–20; THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 13–35 (1984).

35. See, e.g., DAVID KIRP, *JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION* (1982).

36. See, e.g., GRAGLIA, *supra* note 29, at 256–62, 277–82; RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* 6–8, 138–39, 288 (1984); Ravitch, *supra* note 16, at 382–84; SOWELL, *supra* note 34, at 12–35. For an early criticism of the Court's lack of legal competence to desegregate the schools that is steeped in the ideas of the American Legal Process School described *infra* notes 38–39 and accompanying text, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

37. See Charles J. Cooper, *The Coercive Remedies Paradox*, 9 HARV. J.L. & PUB. POL'Y 77, 80–81 (1986).



Looking closely at these two crucial cycles of court-driven educational reform—federal court sponsored school desegregation from 1954 to 1990, and state court sponsored funding equalization since the early 1970s—this section concludes that both evaluations are partially correct but fundamentally flawed. As we demonstrate below, when judges could plausibly think that ending a wrong was itself a sufficient remedy for a grave social injustice, they were relentless in their willingness to stop the wrong. But when it became clear that forbidding a wrong, far from immediately correcting a harm, instead required choices among complex and competing ideas of the right, judges withdrew from the struggle as relentlessly as they had initiated it. Casting the issue as one of the boldness or timidity of courts thus misses the mark.

Equally wide of the mark is the opposing view, which trusts the political branches and private actors to remedy deep social problems if only left free of judicial meddling. These branches' and actors' tolerance of school segregation and egregious disparities in public school funding suggests otherwise. Even after judges, having broken the logjam and forced consideration of these issues, withdrew from the remedial field, politicians and private actors made little progress towards effective correctives. Excoriating judges for zealous meddling is no more help to understanding the successes and failures of school reform than berating them for timidity.

These symmetrical misunderstandings grow out of common assumptions, rooted in the American Legal Process School, about the institutional strengths and weaknesses of our democratic order.<sup>38</sup> In the American Legal Process view, the Constitution, as refined by the New Deal, creates through the separation of powers an ensemble of public and private institutions well-suited to the changing problems of complex democracies.<sup>39</sup> But it is not immediately clear which branch or branches of government, if any, should have responsibility for solving emergent problems. Misallocating responsibility compounds the original problem because the appropriate institution is paralyzed, while the inappropriate one uses its authority to make a bad situation worse. Only by implausibly presuming that we should be able, on reflection, to identify the right institutional tools for the job, and yet that we often imprudently select the wrong one, can the controversies of two vast cycles of educational reform be transformed into a dispute over who the best actor would have been, rather than over which actions would have been best.

To these common assumptions corresponds a common blind spot regarding the capacity of our democratic order for fundamental innovation. In assuming that the basic features of our institutions are fixed, the left and right adherents of this view miss the possibility of innovation in the tasks of both the judiciary and public administration and in the relation between citizens and their government.

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38. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958).

39. See *id.* at 179–98.

We argue below that even as the courts were failing to complete the reforms they initiated, they were incidentally facilitating just this sort of innovation in democratic problem solving.

This section retells the story of the successes and failures of these two cycles of educational reform, focusing not on the fidelity of courts and other institutions to their putative roles, but on their actual reform capacities and limitations, the relation between these, and the encouragement the courts eventually gave to the emergence of some of the innovations upon which a comprehensive and enduring reform of the public schools may be built.

### A. School Desegregation

For some observers, the federal courts' desegregation of schools between 1968 and 1973 qualifies as among the most successful and broad-ranging social reforms in the entire course of American history.<sup>40</sup> In the preceding decade and a half, the Supreme Court repeatedly ruled that the Equal Protection Clause barred racial segregation of public schools, even if nominally voluntary, because public education was a crucial governmental service that was rendered inferior for black children when it was provided separately for whites and blacks.<sup>41</sup> But the Court undercut these affirmations through its respect for local political decision making and its fear of overturning school systems on the verge of explosion. The remedial machine was thus to run only at "all deliberate speed."<sup>42</sup> Under these circumstances, states were able to stop reforms, first through massive, aggressive public resistance, then through more furtive, privately concerted obstruction.<sup>43</sup> Convinced finally that its deference to the self-reforming capacities of civil society was being used for mean ends, the Court with the help of the Department of Health, Education and Welfare ordered integration "forthwith."<sup>44</sup> The result was the almost instantaneous integration of schools attended by millions of chil-

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40. See sources cited *supra* notes 30, 33.

41. See, e.g., *Monroe v. Bd. of Comm'rs*, 391 U.S. 450, 459 (1968); *Green v. County School Bd.*, 391 U.S. 430, 441 (1968); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 & n.11 (1954); Liebman, *supra* note 29, at 1476-77.

42. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) ("*Brown II*"). See JACK GREENBERG, *CRUSADERS IN THE COURTS* 206, 389-91 (1994); Liebman, *supra* note 29, at 1486, 1587.

43. See, e.g., NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* 97-81, 237-50 (1969); GREENBERG, *supra* note 42, at 217-55; ANTHONY LEWIS & THE NEW YORK TIMES, *PORTRAIT OF A DECADE, THE SECOND AMERICAN REVOLUTION* 32-45, 208-10 (1964); GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* 102-50 (1969); J. HARVIE WILKINSON, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978*, at 51-52, 61-127 (1979).

44. See, e.g., *Alexander v. Holmes County Bd. Of Educ.*, 396 U.S. 19, 20 (1969) (per curiam); Green, 391 U.S. at 437-39 & n.4; GREENBERG, *supra* note 42, at 383-91; STEPHEN L. WASBY, ANTHONY A. D'AMATO, & ROSEMARY METRAILER, *DESEGREGATION FROM BROWN TO ALEXANDER* 377-407 (1977); Liebman, *supra* note 29, at 1466 n.5, 1472-73. On HEW's role, see HARRELL R. RODGERS & CHARLES S. BULLOCK, *LAW AND SOCIAL CHANGE* 18 (1972); Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 *LAW & CONTEMP. PROBS.* 7, 20-26 (1975); ORFIELD, *supra* note 43; Note, *The Courts, HEW, and Southern School Desegregation*, 77 *YALE L.J.* 321, 356-64 (1967).

dren in the 1968–1969 to the 1971–1972 school years.<sup>45</sup> A longer-term result was rising SAT scores of black children who entered desegregated schools during this period. This substantially narrowed the gap between black and white achievement levels by the 1980s.<sup>46</sup> No wonder many observers concluded that courts had an indispensable role to play as a forum of last resort and an instrument of dramatic social reform.<sup>47</sup>

This success obscured, however, the narrow circumstances on which it was ultimately based. What went nationally by the name of desegregation was in fact something more particular: desegregation of county-wide school districts in the rural South that were segregated by force of explicit state statutes.<sup>48</sup> This focus was largely by lawyerly design. It was easy to demonstrate in court that rural southern schools for blacks were not remotely equal to those for whites.<sup>49</sup> Not surprisingly, therefore, when the Court's three famous orders to integrate "now" finally came, they were all directed towards just this kind of district.<sup>50</sup>

A deeper consequence of this strategy was that racial integration, once finally ordered, occurred almost automatically.<sup>51</sup> Because each county operated a single set of acceptable public schools for whites and another set of clearly inferior schools for blacks, shutting down the latter automatically moved black children to the former. Ending segregation thus achieved racial justice in schools whose quality was agreeable to the entire community. This solution also improved black educational achievement: Much of the increase in black test scores during the period can be traced to graduates of rural southern schools that had desegregated in the early 1970s.<sup>52</sup>

45. See, e.g., GREENBERG, *supra* note 42, at 383–91, 398–401; HAROLD HOROWITZ & KENNETH KARST, *LAW, LAWYERS AND SOCIAL CHANGE* 239–40 (1969); WASBY, D'AMATO & METRAILER, *supra* note 44, at 407–08; MARC YUDOF, DAVID L. KIRP & BETSY LEVIN, *EDUCATIONAL POLICY AND THE LAW* 486 (3d ed. 1992); Orfield, *supra* note 32, at 42.

46. See Liebman, *supra* note 29, at 1624–25 & n.675.

47. See sources cited *supra* notes 30, 33.

48. See, e.g., WILLIS HAWLEY ET AL., *STRATEGIES FOR EFFECTIVE DESEGREGATION: LESSONS FROM RESEARCH* 4 (1983) ("The greatest progress in desegregation has been in the South where changes have been dramatic and lasting."); GARY ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968–80*, at 1–12 (1983); FINIS WELCH & AUDREY LIGHT, *U.S. COMM'N ON CIVIL RIGHTS, NEW EVIDENCE ON SCHOOL DESEGREGATION*, 6, 8, 18–21 & Tables 8–11 (1987); Gary Orfield, *School Desegregation in the 1980s*, in 4 *EQUITY & CHOICE* 25, 25–26 (as of 1984, less than 30% of all black children in the south attended 90–100% minority schools compared to over 55% in the Northeast). See also Liebman, *supra* note 29, at 1465–66, 1470–72 (comparing great progress of school desegregation in rural South to poor progress in urban North and West).

49. See, e.g., GREENBERG, *supra* note 42, at 116–32; RICHARD KLUGER, *SIMPLE JUSTICE* 346–66 (1975).

50. *Carter v. West Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 420 (1968). See GREENBERG, *supra* note 42, at 383–87, 582.

51. See GREENBERG, *supra* note 42, at 380–81, 388–91, 398–401; Liebman, *supra* note 29, at 1466 nn.5–6.

52. See, e.g., Jomills Braddock & James M. McPartland, *The Social and Academic Consequences of School Desegregation*, *Equity & Choice*, Feb. 1988, at 7 (African Americans account for about forty percent of recent overall gains in SAT scores; the "most significant gains

Soon desegregation moved to southern cities and from there to the urban North and West. Under these more complex conditions, the ambiguous goals of desegregation<sup>53</sup> became more and more apparent, prompting concerns about the availability of corresponding remedies.<sup>54</sup> In these settings, it was possible to see the same schools either as analogous to those in the rural South in the 1950s, or as the legitimate result of assigning children to schools by locality.<sup>55</sup> If the goal of the original *Brown* decision was to end deliberate segregation, then neighborhood schools, even if segregated in fact, might be constitutionally acceptable. If the goal, instead, was to end state-created racial separation, then a neighborhood assignment principle resulting in segregation was no more acceptable than an explicitly segregative principle.

Such questions invited endlessly more. Suppose agreement to aim for a multi-racial society because people draw benefits from interaction with members of other races.<sup>56</sup> Does that require occasional mixing? Enforced homogenization?<sup>57</sup> Access to crucial pathways to economic and political power?<sup>58</sup> Or suppose the goal is "just" to eliminate government implication in racial separation.<sup>59</sup> Is the state implicated whenever segregation results from lines the

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have come in the South, where school desegregation has had its greatest impact"); U.S. DEP'T OF EDUC., THE READING REPORT CARD, 1971-1988: TRENDS FROM THE NATION'S REPORT CARD 14-15 (1989) (in 1971, white high school students on average scored fifty-three points (ten percent) higher than blacks on prestigious testing group's 500-point reading scale; in 1988, the gap was twenty points (four percent)).

53. *Brown I* appears today as a confusing mélange of explanations for desegregation: ending explicit, state-mandated racial discrimination; forbidding any technique the state uses to favor one group of citizens and demean another; creating a multiracial society; enhancing educational opportunity for African-Americans. See Liebman, *supra* note 29, at 1472-540 & n.353.

54. *Brown II* now looks like a concoction of high-minded remedial aspirations, naïve deference to presumptively well-intentioned state actors, buck-passing discretion to lower courts, and a dispensation all around from any but deliberate speed. See, e.g., GREENBERG, *supra* note 42, at 389-91. See generally WILKINSON, *supra* note 43, at 132 ("The problem is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff, is it also less clearly a constitutional requirement the Supreme Court is entitled to impose?").

55. See Liebman, *supra* note 29, at 1472.

56. See generally CHRISTOPHER JENCKS ET AL., INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 106 (1982); MICHAEL WALZER, SPHERES OF JUSTICE 217, 223-24 (1983); Robin West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 716, 735 (1985); Marc Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 456-58 (1973).

57. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1073-75 (1978) (criticizing the assumption that the goal of *Brown* was to attain a society in which "everybody is a creamy shade of beige").

58. See Liebman, *supra* note 29, at 1495-500; Richard Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223, 245, 249-51 (1981).

59. See, e.g., Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 34-36, 42 (1976); Frank Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 277, 286,

state draws?<sup>60</sup> Or only when there is malice in the heart of the line-drawer?<sup>61</sup> Or suppose the goal is to improve the public education of black children.<sup>62</sup> Higher test scores presumably count as one such improvement. But what about higher completion rates in white-dominated institutions of higher learning? Lower teenage pregnancy and delinquency rates? Better jobs as adults?<sup>63</sup>

Even as the Court anxiously husbanded its legitimacy by emphasizing points of agreement rather than divisive questions,<sup>64</sup> commentators rendered the ambiguities of the Court's opinions as fundamental differences of principle.<sup>65</sup> For example, could any order requiring citizens of one named group to associate with citizens of another be justified as the application of any neutral principle applicable to all citizens in the same situation regardless of particulars such as their race?<sup>66</sup> But isn't the state compelled to correct manifest insults to democratic principles and the rule of law implicit in state validation of a virulent caste system?<sup>67</sup> Isn't the state's obligation to perform certain tasks—including the education of an informed citizenry—so fundamental to a well-ordered democracy that it may, in fulfilling that responsibility, burden particular groups that are innocent of any improper conduct?<sup>68</sup>

No wonder, then, that undertaking to reengineer the nation's schools and school districts, one by one, in service of an educational, social or political reform that nobody could define with compelling precision eventually proved

298–310 (1972).

60. See, e.g., Paul Dimond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. C.R.-C.L. L. REV. 1, 2, 4–11 (1972); Owen M. Fiss, *The Charlotte-Mecklenburg Case: Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 698 (1971) [hereinafter Fiss, *Charlotte-Mecklenburg*]; Owen M. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3, 18, 34–35 (1974) [hereinafter Fiss, *Uncertain Path*].

61. See, e.g., Brest, *supra* note 59, at 12–14; Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

62. See, e.g., AMY GUTMANN, *DEMOCRATIC EDUCATION* 161–63 (1987); Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN, NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 90, 98–101 (Derrick Bell ed., 1980); Owen M. Fiss, *School Desegregation: The Jurisprudence of Busing*, 39 LAW & CONTEMP. PROBS. 194, 200, 207 (1975); Freeman, *supra* note 57, at 1067.

63. See Liebman, *supra* note 29, at 1485–95.

64. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 611 n.62 (1983); Denis Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court 1948–1958*, 68 GEO. L.J. 1, 61 (1979); WILKINSON, *supra* note 43, at 61–62, 78–102 (criticizing the Court for emphasizing apparent consensus while depriving the nation of needed guidance).

65. See sources cited in Liebman, *supra* note 29, at 1480 n.104.

66. See Wechsler, *supra* note 36, at 33. See generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 172–73 (1976).

67. See Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

68. See Fiss, *Charlotte-Mecklenburg*, *supra* note 60; Fiss, *Uncertain Path*, *supra* note 60, at 33–35. For other ramifications of this debate, see, for example, Brest, *supra* note 59, at 36–43; Liebman *supra* note 29, at 1614–35; Ronald Dworkin, *Social Sciences and Constitutional Rights: The Consequences of Uncertainty*, in *EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS* 20, 25–31 (Ray C. Rist & Ronald J. Anson eds., 1977).

too much for the Court. After tarrying with the vague idea of “disestablishing” previously segregated urban schools without requiring formulaic integration,<sup>69</sup> the Court was finally overtaken by the ambiguities of its decisions when it ventured into northern and western desegregation. The result was the Court’s adoption in the mid-1970s of three legal rules that radically constrained and eventually stopped the movement for desegregation.

First was the 1973 holding in the Denver case that the state’s operation of schools in which children in fact were segregated by race did not by itself violate the Equal Protection Clause and justify judicial intervention.<sup>70</sup> State-operated schools—however segregated by race and however educationally inferior as a result—were beyond judicial help unless plaintiffs could prove that responsible state agencies had deliberately (or, in the word of the day, “invidiously”) intended to operate the schools on a racial basis.<sup>71</sup> Doing so ruled out the philosophically more controversial goals of multi-racialism and educational adequacy. It also absolved the courts of remedial responsibility for the many racially segregated schools that only “happened” to end up that way though an application of a neighborhood, choice or other “race-neutral” assignment principle.

Second, in the 1974 Detroit case, the Court ruled that state officials who *had* invidiously segregated black children in Detroit from white children in the suburbs had no legal duty to remedy the situation, because the affected suburban school districts had not *themselves* intentionally segregated the *city district’s* schools.<sup>72</sup> The Court justified this curious ruling on the ground that its remedial powers were limited by respect for the tradition of “local control” of school districts (even if state officials had ignored that tradition in reaching the discriminatory decisions that the Court was refusing to reverse).<sup>73</sup>

These constricting rules, however, still left room for relief because racial discrimination in urban public schools, housing, real estate and banking regulation, and transportation was pervasive and blatant. To make relief effectively unattainable, it took a third rule (defined in a series of cases from Pasadena in 1976 to Kansas City two decades later<sup>74</sup>), which required plaintiffs

69. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971).

70. *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973).

71. See *id.*; see also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979).

72. *Milliken v. Bradley*, 418 U.S. 717 & n.14, 733, 745–48, 753 (1974); see *Missouri v. Jenkins*, 515 U.S. 70, 87, 91–97 (1995).

73. See *Milliken*, 418 U.S. at 741–44; see also *Jenkins*, 515 U.S. at 97–98. These cases exacerbated the faultlines running through the legal doctrine and the communities affected by it. For example, urban working class white families stuck with forced busing *within* the city (from which their suburban equivalents were immune) saw the ruling and its aftermath as an example of gross class discrimination. See J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* 470–72 (1985). Commentators determined to explain desegregation as designed to cure the demonstrable effects of intentional segregation chalked it up to an ill-defined and admittedly uncontrollable doctrine of “remedial limits” that allowed or even required major effects of desegregation to remain unremedied. See, e.g., Gewirtz, *supra* note 64, at 646–48.

74. See, e.g., *Jenkins*, 515 U.S. at 87–97; *Freeman v. Pitts*, 503 U.S. 467, 491–92, 496

to match particular state decisions to specific segregative outcomes. Under this requirement, plaintiff children first had to prove that school districts, transportation agencies, real estate and banking regulators, and housing, urban renewal and relocations authorities had invidiously tried to separate whites from blacks. Then they had to prove that those efforts—exclusive of the imperatives of wealth, economically and socially spawned migration, public policy considerations besides race, and private preferences—“caused” substantial existing school segregation. In the two decades since the Court made causation a crucial issue, no court has even attempted to identify the multivariate or other analysis sufficient for this demonstration. Although the effort to accomplish the necessary analysis nearly bankrupted the NAACP Legal Defense Fund and other civil rights organizations, it produced little permanent educational reform.<sup>75</sup>

The upshot was to limit intervention to cases where officials publicly proclaimed their desire to discriminate and publicly exhibited their segregative successes. There was nothing half-hearted about the Court’s retreat from an expansive program of desegregation, just as there had been nothing half-hearted about its original embrace of one. When its decisions produced self-evident remedies, as in the rural South, the Court was fully prepared to mobilize the coercive powers of the state. When its own decisions raised more questions than they answered, it was not. Its turnabout was the fruit of a complex and inarticulate decision about its own capacity to define and solve problems, not a matter of intestinal fortitude nor a fully considered judgment about the relevant capacities of other branches of government.

Even in the urban North and West, however, a few multidistrict desegregation cases suggested a distinct potential of courts. When they redistributed children among schools and redefined districts not as an end in itself but instead to renew the processes through which local, county and state officials and educators interacted to administer schools, federal judges in Wilmington, Delaware, Charlotte, North Carolina, and Louisville, Kentucky for a time energized surprising and effective coalitions of actors, both inside and outside the schools. Those coalitions, in turn, revitalized entire regional educational systems and even the cities they straddled.<sup>76</sup>

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(1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 406, 417 (1977); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976).

75. The first author on this Article was the NAACP Legal Defense Fund’s lead attorney on the *Kansas City* case from 1982 to 1985.

76. See HOCHSCHILD, *supra* note 29, at 80–82 & nn.140–44; JEFFREY A. RAFFEL, *THE POLITICS OF SCHOOL DESEGREGATION: THE METROPOLITAN REMEDY IN DELAWARE* 174–95 (1980); SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 97TH CONG., *REPORT ON SCHOOL DESEGREGATION* 10 (Comm. Print 1982); Willis D. Hawley and Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in *ELIMINATING RACISM: PROFILES IN CONTROVERSY* 281, 285 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988); Ward Sinclair, *Desegregation’s Quiet Success*, WASH. POST, June 17, 1978, at A1. These school districts

experience[d] an educational renaissance characterized by curricular reform, moder-

Two decades later state courts were to stumble again upon the advantages of this form of external collaboration as they worked through the complexities of school finance reform, to which we turn next.

### B. Equitable Funding

Even as the federal courts advanced and retreated, reformers turned to state courts to pursue equalization of per-pupil funding across school districts within states. The focus on the state courts was compelled by the Supreme Court's unwillingness to entertain claims of this sort.<sup>77</sup>

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nized grade structures . . . , revitalized teaching staffs, enhanced parental involvement and financial support for the schools, and—perhaps most importantly—a revived administrative bureaucracy. This effect . . . prompted [black critics of integration] to criticize desegregation as a screen for enhancing the education opportunities for *white* children.

Liebman, *supra* note 29, at 1621. These remedies operated by reconfiguring segregated metropolitan school districts into new sets of racially mixed districts, then turning the reorganized units loose, under the guidance of newly interlocked local, regional and state officials and a variety of actors from the private sector, to reorganize the governance, administrative, and pedagogical structures of the newly reconfigured schools and districts. Hochschild attributes the success simply to the capacity of desegregation to shake up previously hide-bound bureaucracies. HOCHSCHILD, *supra* note 29, at 81–82. A closer look reveals that the catalyst for change was not just the shake-up of the schools but also the new combinations of social actors (cutting across racial as well as jurisdictional and disciplinary lines) that the remedies mobilized and organized and, indeed, a new form of interracial politics. See Liebman, *supra* note 29, at 1614–66; RAFFEL, *supra*, at 77–78.

77. Taking seriously the Court's recognition in *Brown* of public education's fundamental importance to developing "hearts," "minds," and citizenship, see *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954), and citing established equal protection doctrine forbidding states to distribute fundamentally important public services unequally on the basis of wealth, see, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956), San Antonio school children attacked Texas's system of distributing educational resources based on the taxable property wealth of the districts in which they lived. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Court declined to intervene, suddenly demoting public education to nonfundamental status, and placing wealth discrimination *absent* a fundamental interest beyond equal protection scrutiny. See *id.* at 18–31. Central to the Court's explanation for doing so was its lack of competence to identify either the educational resources that might be deemed fundamental—or, indeed, whether levels of *any* resources could be meaningfully linked to desirable educational outcomes—or the proper fiscal measures for making sure that those resources were evenly distributed. See *id.* at 41–42 ("the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues"; "[i]n addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels"); see also *id.* at 43 & n.86, 44, 56–59. Instead, the Court extolled the comparative policy-making advantages of the political branches and particularly, in the educational sphere, of local political control. *Id.* at 44.

This summary compresses and partially reconfigures the usual description of the "three waves" of school-finance litigation. The effort to promote finance equalization under the Equal Protection Clause of the Fourteenth Amendment, ending disastrously in the *Rodriguez* decision, is the first wave. Below we address the other two waves—state equal protection claims and "adequate education" claims. See *infra* notes 80–107 and accompanying text. For more comprehensive treatments of this history, see William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995);



Developments in the state funding equity cases paralleled those in the federal desegregation cases. Judges in many jurisdictions advanced confidently as long as there appeared to be a straightforward remedy for any offensive disparity in the deployment of public resources. They broke stride, however, once further analysis revealed unexpected complexities in goals and remedies. The chief difference was the somewhat larger set of state courts that responded to the complexity along the lines of the multi-district school desegregation courts just noted<sup>78</sup>—by mobilizing novel combinations of social actors to address problems they could not resolve themselves.<sup>79</sup>

The equalization claims that at least nominally succeeded in state courts relied on one or a combination of two legal theories. The first is grounded in state equal protection provisions and is typified by California's, Connecticut's and all but the most recent stages of New Jersey's experiences.<sup>80</sup> It issued in a series of judicial directives to equalize per-pupil expenditures across districts, which most states eventually satisfied by vastly expanding their role in school funding.<sup>81</sup> The second theory is grounded in provisions found in nearly all state constitutions requiring that the state provide an "adequate public education,"<sup>82</sup> a "thorough and efficient system of free schools,"<sup>83</sup> or "an educational program of high quality."<sup>84</sup> Typified by Texas's and Kentucky's as well as the recent stages of New Jersey's experience, this second theory resulted in orders to provide levels of funding that were educationally "sufficient" or "adequate," regardless of whether they were equal.<sup>85</sup> The earlier cases tended to invoke equality theories, while the later ones chiefly advanced adequacy theories.<sup>86</sup> Adequacy theories arguably found somewhat greater favor with courts,<sup>87</sup> perhaps because courts were more willing to criticize an existing regime for being inadequate than to affirmatively replace one regime with another, certifiably equal one.<sup>88</sup>

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McUsic, *supra* note 6; Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51 (1998).

78. *See supra* note 76 and accompanying text.

79. *See sources cited supra* note 76.

80. *See Heise, supra* note 77, at 1155–63.

81. *See* G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180, 181–89 (1986); McUsic, *supra* note 6, at 108–15.

82. GA. CONST. art. VIII, § 1, para. 1.

83. N.J. CONST. art. VIII, § 4, para. 1; W. VA. CONST. art. XII, § 1.

84. VA. CONST. art. VIII, § 1. *See Heise, supra* note 77, at 1158–59 & n.64; Rebell, *supra* note 6, at 228.

85. *See, e.g., Rebell, supra* note 6, at 226–28 & n.31.

86. *See, e.g., Heise, supra* note 77, at 1157–65.

87. *See, e.g., Rebell, supra* note 6, at 228.

88. *See, e.g., Clune, supra* note 77 (explaining the switch from equity to adequacy as aimed at finding new "tools which are more firmly grounded on the constitutional base, more closely matched to the task at hand, and less threatening in their reach and power"); McUsic, *supra* note 6, at 105–08, 115–19 (explaining the switch as providing a more bounded and targeted focus of judicial activity than notions of "equality" and "equal protection"). Likewise, the focus on "sufficient school funding rather than the consequences of local property tax revenue suggests that

Or, the shift from equality to adequacy theories may simply have coincided with a perception of increasing deterioration of American schools, enhancing the urgency of a remedy.<sup>89</sup>

Doctrinal nuances aside, all but the most recent outcomes of finance equity litigation tended to have crucial features in common. First, they reduced the inequality of per pupil spending across districts.<sup>90</sup> Second, they increased the funding of at least some poorly financed schools and districts.<sup>91</sup> Third, they increased the state's share of total funding for schools and reduced the local share. This shift centralized control over all aspects of the educational system at the expense of the American tradition of local autonomy in education.<sup>92</sup> But,

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local property tax revenue is more likely to remain an important source of school funds, thus helping to preserve local control." Heise, *supra* note 77, at 1175. Although "indeterminacy of the measure of an adequate education poses a . . . challenge to efforts to deploy adequacy arguments in the courts" that is at least as "daunting" as the challenge posed by indeterminate equality measures, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 172 (1995), litigants and judges partially obscured the problem, at least initially, by defining "educational adequacy" in terms of adequate (but not necessarily equalized) *funding*. In the logic of this approach, "all children are entitled to an education of at least a certain quality and . . . more money is necessary to bring the worst school districts up to the minimum level mandated by the state education clause." William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603 (1994). See also Heise, *supra* note 77, at 1176 (measuring the success of educational adequacy lawsuits by their "impact on school finance systems.").

89. See McUsic, *supra* note 6, at 117.

90. For example, by the mid-1980s, there was less than a \$200 difference in the amount California spent each year on ninety percent of the state's public school children. See, e.g., William N. Evans, Sheila E. Murray & Robert M. Schwab, *The Impact of Court-Mandated Finance Reform, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 72, 74-75 (Helen F. Ladd et al. eds., 1999); Joseph T. Henke, *Financing Public Schools in California: The Aftermath of Serrano v. Priest and Proposition 13*, 21 U.S.F. L. REV. 1, 22-23 (1986); Bradley W. Joondeph, *The Good, the Bad and The Ugly: An Empirical Analysis of Litigation Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 793-97 (1995). This forced equalization was an astounding feat, given the huge differences among districts that were typical before the California suit was filed.

Equalization was a mixed blessing, however. Although it usually provided *more* money to poor districts, it potentially turned equal funding into a cap on how *much*. See, e.g., Patricia F. First & Louis F. Miron, *The Social Construction of Adequacy*, 20 J.L. & EDUC. 421, 428 (1991) ("Research has shown undesirable consequences of improving measures of equity (i.e., fairness in distribution resources) without, at the same time, improving on those resources. The result is an undesirable 'leveling-down' of the acceptable minimum of educational offerings."). Another problem is that "[s]tudents from different backgrounds and possessing varying educational needs and learning styles impose varying costs on school systems constitutionally charged with a duty to educate them." Heise, *supra* note 77, at 1169. See also McUsic, *supra* note 6, at 106.

91. See, e.g., Evans, Murray & Schwab, *supra* note 90, at 78-79; Joondeph, *supra* note 90, at 789-808.

92. See, e.g., Evans, Murray & Schwab, *supra* note 90, at 81; Hickrod, *supra* note 81, at 189; Robert C. Johnston & Jessica L. Sandham, *States Increasingly Flexing Their Policy Muscles*, EDUC. WEEK, Apr. 14, 1999, at 1; Joondeph, *supra* note 90, at 820-22; McUsic, *supra* note 6, at 111 ("[S]tate legislative response to school finance suits almost always involves some shift from local to state financing."); Neil D. Theobald & Faith Hann, *Ample Provision for Whom? The Evolution of State Control Over School Finance in Washington*, 17 J. EDUC. FIN. 7, 15-17 (1991); Neil D. Theobald & Lawrence O. Picus, *Living with Equal Amounts of Less: Experiences of States*

fourth, where these effects were most pronounced, overall expenditures on education stagnated or declined, so that equalization of spending within the state did not improve the state's place in the national table of state education spending.<sup>93</sup> Finally, even in poor districts where finance equity suits increased per pupil spending, no or disappointingly little educational improvement occurred.<sup>94</sup>

The evolution of litigation efforts in the Connecticut and New Jersey cases starkly documents this failure. In Connecticut, the father of the named plaintiff in the successful finance-equity suit filed a second major suit several years later challenging the adequacy of the education provided poor and African-American children by the state's financially equalized school districts.<sup>95</sup> In New Jersey, the same thing happened within the confines of a single, continuing lawsuit. More than 25 years after their original filings, the plaintiffs went back to court. They argued that improved educational funding had not improved educational outcomes in poor and urban districts and asked the court to supplement the orders setting spending levels with additional orders detailing what the expenditures should be for.<sup>96</sup>

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with *Primarily State-Funded School Systems*, 17 J. EDUC. FIN 1 (1991). In regard to the American tradition of local control over education, see, for example, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973); *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972).

93. See, e.g., *First & Miron*, *supra* note 90, at 428; *Joondeph*, *supra* note 90, at 810–13; *Theobald & Picus*, *supra* note 92.

94. See, e.g., James S. Liebman, *Implementing Brown in the Nineties: Political Reorganization, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VIR. L. REV. 349, 392–93 (1990); *McUsic*, *supra* note 6, at 105–15; Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1075–78 (1994). In the standard account, this one focusing on the New Jersey case as of 1998, the suit was

not enough to induce the development of a constitutionally acceptable school finance system. That such legislative measures were not adequate, particularly in light of the almost three decades of effort, fuels unflattering debates over judicial efficacy. By struggling to achieve what it sets out to achieve, the New Jersey Supreme Court risks eroding precious capital relating to its legitimacy as a political institution.

*Michael Heise, Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 322 (1998).

95. See James E. Ryan, *Sheff, Segregation and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 537 (1999) (“Plaintiffs thus did not file *Sheff* because earlier school finance litigation had been unsuccessful in equalizing resources; rather, plaintiffs filed *Sheff* because equalizing resources was not enough.”). Compare *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (granting finance-equity relief to class represented by children of Wesley Horton) with *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996) (permitting adequacy-based lawsuit brought by Wesley Horton and other lawyers to proceed to trial). On the failure of the “successful” *Horton* suit to improve the education of poor children in the states, see, for example, *Sheff*, 678 A.2d at 1273, 1296–97 n.2, 1334 (Borden, J., dissenting); *McUsic*, *supra* note 6, at 111 (“Despite the millions of dollars in state resources spent on the Hartford schools, students attending them had the lowest test scores and the highest dropout rates in the state.”); George P. Richardson & Robert E. Lamitie, *Improving Connecticut School Aid: A Case Study with Model-Based Policy Analysis*, 15 J. EDUC. FIN. 169, 170–71 (1988) (concluding that much of increased state aid prompted by a successful finance-equity suit did not go into improved educational programs but to tax relief in high-tax urban areas).

96. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 366 (N.J. 1990) (describing lack of any apparent increase in student achievement despite years of increased spending on public schools

The developments in these cases reveal a doctrinal broadening and institutional opening of school reform litigation generally. The doctrinal broadening has meant that adequacy no longer connotes financial adequacy. Instead, an adequate education is one that meets the demands of contemporary society. What counts is the adequacy of the outcome, not the cross-district equality of the inputs.<sup>97</sup> This broadening has gone hand in hand with an institutional opening. Because the meaning of an adequate outcome and the means for achieving it are hard to define, courts have begun to propose workable but open-ended definitions of adequacy and to establish measures of progress in attaining it.

This opening to outside institutions has taken various forms, the variety of which reveals the courts' uncertainty about the link between a finding of constitutional inadequacy in schooling and the corresponding remedy. In some cases the courts extract standards specifying very general goals for the states' schools from expert accounts of well-functioning schools. It may then fall to the legislature to translate these goals into a workable plan for educational reform. In a second group of cases, courts select one or more detailed models of successfully reformed schools. School districts found to be violating their constitutional obligations then are required to choose a model or an unlisted alternative that delivers superior results. In a third category, the court issues a sibylline rejection of solutions that do not meet its adequacy standard, while remaining silent as to the specifics of that standard or how to comply with it.

In the first category is Kentucky. In 1990, its supreme court declared not only the state's educational financing mechanism but its entire "system of common schools" constitutionally deficient and ordered the state to replace it with a system enabling Kentucky students to graduate with seven educational skills and categories of knowledge.<sup>98</sup> (These were derived from a catalogue of essential competencies for citizens of a democracy compiled and widely circulated by a

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prompted by ongoing school-finance litigation); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 925–31 (1998) (giving account, by school children's lawyer in the New Jersey finance equity lawsuit, of the failure of the early rounds of the suit to improve the education of poor children, and more recent efforts to secure orders prescribing "whole school" and other substantive reforms). As Professor McUsic points out, "the plaintiffs' [own] position" in the latest Connecticut lawsuit and in the later stages of the New Jersey litigation support the following conclusion: "Unfortunately, after decades of lobbying and litigating for every dollar they could find in increased funding and special programs, advocates on behalf of . . . high-poverty districts acknowledged that students still receive[d] inadequate education." McUsic, *supra* note 6, at 129.

97. For legal observers, there is irony in the fact that although adequacy appealed to courts because of the simplicity of the demands it placed on legal institutions and because it seemed legally more tractable and less ambitious, it turned out to embroil them more deeply in complex and novel collaborations with outside institutions. See, e.g., Heise, *supra* note 77, at 1163–76; McUsic, *supra* note 6, at 115–20, 134–37.

98. Illustrating the seven required skills and knowledge are the first and sixth: "sufficient oral and written communication skills to enable [the] student[] to function in a complex and rapidly changing civilization" and "sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently." *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989).

statewide movement for educational reform that we discuss in detail below.)<sup>99</sup> In response, the Kentucky General Assembly adopted the Kentucky Education Reform Act in 1990,<sup>100</sup> one of the “most far-reaching” state educational reform efforts in the nation, which not only increased revenues for all school districts in the state by 8 to 25 percent<sup>101</sup> but also “reshaped the curriculum [and] governance . . . of Kentucky schools.”<sup>102</sup>

The second category of reforms is exemplified by New Jersey. In 1998, after years of failed finance-equalization efforts, the New Jersey Supreme Court gave the state three years to implement “whole school” reform programs (or, possibly, alternative programs of the districts’ own choosing) in several hundred urban schools.<sup>103</sup> Broadly speaking these involved a bottom-up needs assessment in the poorest districts culminating in the elaboration of comprehensive school- and district-wide reform plans.<sup>104</sup>

Texas typifies the third category. The state’s high court thrice ordered the state legislature to develop a new mechanism for funding schools sufficient, in the language of the state constitution, to permit an “efficient” public school system and “a general diffusion of knowledge” to its students.<sup>105</sup> The Texas Supreme Court’s combination of self-assertion and deference to the political branches was so bewildering that one frustrated state legislator, summoned to yet another special legislative session, complained that he was ready to “surrender” to the Texas Supreme Court if it would only tell him where to turn himself in.<sup>106</sup> We tell the tortuous story of the back-and-forth between the Texas courts and legislature below. It culminated in 1995 in the revision of the entire Texas Education Code, removing many regulatory constraints on individual districts and replacing them with a two-pronged program of local control over curriculum, educational materials, and instructional philosophy coupled with a powerful rating system for districts and schools based on scores on criterion-referenced achievement tests of the state’s own design.<sup>107</sup>

As these examples suggest, school reform litigation has recently come to engage a much broader range of actors and to spawn a variety of new institutions that, until they developed, would have been impossible for the courts or the legal system to imagine, much less to embody in a court order or legal rule. In so

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99. Compare *id.* with THE PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE, GAINING GROUND: HARD WORK AND HIGH EXPECTATIONS FOR KENTUCKY SCHOOLS 24–25 (Nov. 1999), available at [www.prichardcommittee.org/pubs/gground.pdf](http://www.prichardcommittee.org/pubs/gground.pdf) [hereinafter GAINING GROUND].

100. Kentucky Education Reform Act, ch. 476, 1990 Ky. Acts 1208 (codified as amended at KY. REV. STAT. ANN. §§ 156–163 and scattered sections (Michie 1999)).

101. Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 497–98 (1999).

102. McUsic, *supra* note 6, at 136.

103. Caroline Hendrie, *N.J. Schools Put Reform to the Test*, EDUC. WEEK, Apr. 21, 1999, at 1.

104. See Tractenberg, *supra* note 96, at 923–27.

105. See, e.g., Clune, *supra* note 6, at 738–40, 747.

106. See *id.* at 754.

107. See, e.g., *infra* notes 215–64 and accompanying text.

doing, we conclude below, the courts are creating a public forum in which to discuss comprehensive reforms of American education that draw on linked innovations in school governance, performance measurement, and the reconceptualization of the teaching profession and pedagogy. In some limited and thus far poorly understood way, they are also coordinating the debate they instigate and enable. This raises at least the possibility that the courts will break out of the cycle of courageous efforts to improve existing institutions, followed by the disheartening recognition of the limits of doctrinally directed interventions and a retreat to caution that preserves the judiciary by sacrificing its original ameliorative ambitions. To make sense of this possibility, it is necessary to step outside the boundaries of the school reform debate as it is posed within the judicial system and to look directly at the broader and convergent developments on which that debate increasingly has drawn.

We do this in four steps. The first focuses on what might be called top-down reforms—innovations in educational standards that allow measurement of school performance and thus ultimately put pressure on school administrators to undertake meaningful reform. The second focuses on what can be thought of as reform from the bottom up—innovations in classroom practice and school organization that lead in the best cases to the creation of “learning communities” capable of serving the most disparate school populations. In the third, we show how these two developments intersect and transform one another. The result is the “New Accountability”—a synthesis in which standards are used to diagnose problems in the performance of individual students, teachers and schools and in which the clinical practice of the “master teacher” is informed and disciplined by systematic comparisons to peer performance that standards enable. Fourth, we show how this synthesis creates the context within which new forms of judicial activism are proving successful.

## II.

### STANDARDS, LEARNING COMMUNITIES AND THE NEW ACCOUNTABILITY

#### *A. Top-Down Reform: Standards, State and Federal*

The innovations in standards that form the framework for the New Accountability system were the late flower of a series of linked reform movements at the state and national levels that date to the early 1980s. These movements were motivated by the recognition that American educational systems ranked miserably in international comparisons. At the national level, these concerns crystallized in numerous reports on the parlous state of U.S. education. Among these, the most influential was *A Nation at Risk*, by the President's National Commission on Excellence in Education.<sup>108</sup> At the state level, where

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108. In 1983, the President's National Commission on Excellence in Education galvanized the so-called “Excellence Movement” with its conclusions that a “rising tide of mediocrity”

early reform partly antedated and partly responded to this report, the nearly uniform response to the perceived crisis was legislation imposing standards of minimum competency on students and teachers. Within a few years of *A Nation at Risk*, nearly all fifty states had adopted some version of comprehensive standards.<sup>109</sup>

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threatens public education in this country and that "[o]ur Nation is at risk." NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983) [hereinafter *A NATION AT RISK*]. The Commission's report noted, *inter alia*, an increase in the number of functional illiterates, a decline in SAT and other achievement scores, and the increasing demand for remedial education. *Id.* at 8-9; accord CARNEGIE TASK FORCE ON TEACHING AS A PROFESSION, *A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY* (1986) [hereinafter CARNEGIE TASK FORCE] (finding a decline in teacher salaries, autonomy, status, and competency); NAT'L GOVERNORS' ASS'N CENTER FOR POLICY RESEARCH AND ANALYSIS, *TIME FOR RESULTS: THE GOVERNORS' 1991 REPORT ON EDUCATION* 97-109 (1986) [hereinafter *TIME FOR RESULTS*] (documenting the sorely inadequate education available to at-risk children); TASK FORCE ON EDUC. FOR ECONOMIC GROWTH, EDUC. COMM'N OF THE STATES, *ACTION FOR EXCELLENCE: A COMPREHENSIVE PLAN TO IMPROVE OUR NATION'S SCHOOLS* 10-11, 30 (1983) (detailing damage to personal and national economic prospects caused by inadequate educational development of vast amounts of human resources); TWENTIETH CENTURY FUND TASK FORCE ON FED. ELEMENTARY AND SECONDARY EDUC. POLICY, *MAKING THE GRADE* 4-5, 15 (1983) [hereinafter *MAKING THE GRADE*] (concluding that demands on schools are complicated by increase in truancy, dropout rates, and violent crimes); see Harry A. Passow, *Tackling the Reform Reports of the 1980's*, 65 PHI DELTA KAPPAN 674 (1984); see also Edward B. Fiske, *Impending U.S. Jobs "Disaster": Work Force Unqualified to Work—Schools Lagging Far Behind Needs of Employers*, N.Y. TIMES, Sept. 25, 1989, at A1 (reporting consensus in business community that American schools are graduating students without the skills needed for sophisticated new jobs); Mark Walsh, *In Poll, College Faculty Say Students Are Unprepared in Basic Skills*, EDUC. WEEK, Nov. 8, 1989, at 5 (citing poll of 5000 college faculty members revealing overwhelming consensus that entering freshmen are seriously ill-prepared for college in terms of their basic skills); Bernard Weinraub, *Bush and Governors Set Education Goals*, N.Y. TIMES, Sept. 29, 1989, at A10 (noting "consensus with[in] the Government and the education establishment that American schools [are] in turmoil and that the education system [is] increasingly lagging behind those of other industrial democracies").

These nationally focused reports, see, e.g., *A NATION AT RISK*, *supra*, at 32; *TIME FOR RESULTS*, *supra*, at 97-109; *MAKING THE GRADE*, *supra*, at 8-20, and a separate set of more targeted studies particularly documented the dismal educational prospects of poor, minority, and limited English proficiency children. See, e.g., COLLEGE ENTRANCE EXAMINATION BD., *EQUALITY AND EXCELLENCE: THE EDUCATIONAL STATUS OF BLACK AMERICANS* (1985); W. VANCE GRANT & THOMAS D. SNYDER, *DIGEST OF EDUCATIONAL STATISTICS 1983-84* (1984); HAROLD HODGKINSON, *ALL IN ONE SYSTEM: DEMOGRAPHICS OF EDUCATION—KINDERGARTEN THROUGH GRADUATE SCHOOL* (1985); HAROLD HODGKINSON, *THE SAME CLIENT: THE DEMOGRAPHICS OF EDUCATION AND SERVICE DELIVERY SYSTEMS* (1989); NAT'L COALITION OF ADVOCATES FOR STUDENTS, *BARRIERS TO EXCELLENCE: OUR CHILDREN AT RISK* (1985) [hereinafter *BARRIERS TO EXCELLENCE*]; NAT'L COMM'N ON SECONDARY EDUC. FOR HISPANICS, 2 "MAKE SOMETHING HAPPEN": HISPANICS AND URBAN HIGH SCHOOL REFORM (1984) [hereinafter *MAKE SOMETHING HAPPEN*]; OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC., *POVERTY, ACHIEVEMENT AND THE DISTRIBUTION OF COMPENSATORY EDUCATION SERVICES* 11-30 (1986).

109. See, e.g., *Changing Course: A 50-State Survey of Reform Measures*, EDUC. WEEK, Feb. 6, 1985, at 11 (noting, as of the mid-1980s, that nearly all fifty states had responded to the reports by adopting some sort of statewide assessment program to measure student achievement); Chris Pipho, *Tracking the Reforms, Part 5: Testing—Can it Measure the Success of the Reform Movement?*, EDUC. WEEK, May 22, 1985, at 19 (pointing out that "[n]early every large education reform effort of the past few years has either mandated a new form of testing or expanded uses of existing testing"). See generally *THE EDUCATIONAL REFORM MOVEMENT OF THE 1980S: PERSPECTIVES AND CASES* (Joseph Murphy ed., 1989) (collecting articles addressing numerous

Conceived as a sincere effort to list the indispensable building-blocks of an effective modern education, this combination of national and state-level reforms was initially misdirected. Above all, the resulting standards and tests focused on individual teachers and pupils,<sup>110</sup> with the aim of creating incentives, mainly negative, for them to do what was needed to provide and profit from an effective education.<sup>111</sup> Students who failed the tests could lose their right to matriculate, graduate or attend state colleges; teachers who did so could lose their jobs.<sup>112</sup> Schools—which presumably had a profound impact on the performance of both teachers and students—were not themselves assessed in any way.<sup>113</sup> Still less could the assessments guide improvement of school performance. To the extent that the minimum competency standards had any immediate practical consequence, it was to narrow the range of what was teachable or even discussable by focusing attention obsessively on whatever was defined as a “minimum competency.”<sup>114</sup>

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aspects of the educational reform movement of the 1980s).

110. See, e.g., Heubert, *supra* note 17, at 179.

111. Among the negative or exclusionary consequences that minimum-standards legislation initially imposed on students falling below standard were placement in lower tracks and denial of eligibility for promotion to a higher grade and to matriculate to another school, to take part in extracurricular activities, to receive a diploma or graduate, to receive a driver's license, and to attend a state university. See, e.g., MARGARET E. GOERTZ, STATE EDUCATIONAL STANDARDS: A 50-STATE SURVEY 10, 27–134 (1986); cf. *Birmingham Drops Skills Test as Requirement for Promotion*, EDUC. WEEK, Nov. 1, 1989, at 3 (test scores eliminated as decisive basis for determining promotion to second through eighth grades because their principle effect was to prevent hundreds of students who passed all their courses from passing to the next grade).

112. Most of the national reports advocated performance standards for students and teachers. See, e.g., CARNEGIE TASK FORCE, *supra* note 108, at 55–103; A NATION AT RISK, *supra* note 108, at 20–31. The vast majority of the programs that were adopted in response relied primarily upon mandatory minimum competency tests in reading, writing, and mathematics and, somewhat less frequently, citizenship, social studies, and science. See GOERTZ, *supra* note 111, at 9 (as of 1985, at least forty-two states required local school districts to administer some sort of basic skills test to students at some time during their school careers). In addition to test-based performance standards, most modern legislative reforms included curriculum-based performance standards that increased the number and difficulty of courses students had to complete satisfactorily before receiving diplomas or other benefits. See WILLIAM CLUNE ET AL., THE IMPLEMENTATION AND EFFECTS OF HIGH SCHOOL GRADUATION REQUIREMENTS: FIRST STEPS TOWARD CURRICULAR REFORM (Consortium for Pol'y Research in Educ., Report No. RR-011, 1989); GOERTZ, *supra* note 111, at 13–16.

113. See Liebman, *supra* note 94, at 375–77. See also the discussion of diagnostic standards *infra* notes 124–27 and accompanying text. As it turned out, the tests did not even serve the goal of individual assessment, because they typically were valid only in the aggregate for populations of school size or larger. They were not valid as measurements of individual competency. See HIGH STAKES, *supra* note 19, at 30; other authority cited *supra* note 19.

114. See, e.g., HIGH STAKES, *supra* note 19, at 38–39; Jones, *supra* note 19, at 200–02; KOHN, *supra* note 19, at 28–31; McNeil & Valenzuela, *supra* note 19, at 132–38; Kathleen Kennedy Manzo, *NAEP Drops Long-Term Writing Data: 'Trend' Test Unreliable Governing Board Says*, EDUC. WEEK, Mar. 15, 2000, at 1. From the beginning, critics of minimum competency tests have argued that they are of dubious reliability and validity, are premised on meaningless and incompatible scales and reference points, and can measure only a single day's performance with regard to a limited range of testable skills that are not actually important to students and adults. See, e.g., Gerald W. Bracey, *The \$150 Million Redundancy*, 70 PHI DELTA KAPPAN 698 (1989); Cannell, *supra* note 19; Linda Darling-Hammond, *Mad-Hatter Tests of Good Teaching*, in THE



For all these reasons, minimum-competency standards had only a marginal impact on American education as of the early 1990s.<sup>115</sup> At their worst, these standards were exploited as a politically expeditious way of demonstrating the moral depravity of American youth—and minority communities—and the way self-serving educational bureaucracies contributed to their condition.<sup>116</sup> Even today, this understanding of standards as nothing more nor less than incentivizing rewards and penalties continues to inform high-stakes testing in the many states that have not replaced it with diagnostic accountability schemes.

Notwithstanding these flaws, the early standards movement was profoundly transformative both politically and institutionally in ways that eventually transformed the standards themselves. Politically, educational standards were perturbing because they lay outside the spectrum of familiar remedies pursued by the usual constituencies. As such, the standards movement distressed advocates of school reform on the left and the right, bringing to light deep ambiguities in their respective positions. Opponents of public schooling saw in standards a regressive reassertion of state control over education.<sup>117</sup> Advocates of poor and minority children saw a dangerous legitimization of a system of

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GREAT SCHOOL DEBATE: WHICH WAY FOR AMERICAN EDUCATION? 247 (Beatrice Gross & Ronald Gross eds., 1985) [hereinafter GREAT SCHOOL DEBATE]; Walt Haney, *Validity, Vaudeville, and Values: A Short History of Social Concerns over Standardized Testing*, 36 AM. PSYCHOLOGIST 1021, 1029–32 (1981); Richard Murnane, *Improving Education Indicators and Economic Indicators: The Same Problems?*, 9 EDUC. EVALUATION & POL'Y ANALYSIS 101 (1987); Neill & Medina, *supra* note 19, at 689–92.

115. This was largely out of concern that the state-level reforms had not succeeded. *See, e.g.*, WILLIAM A. FIRESTONE, SUSAN F. FUHRMAN & MICHAEL KIRST, THE PROGRESS OF REFORM: AN APPRAISAL OF STATE EDUCATIONAL INITIATIVES 23–26 (Consortium for Pol'y Research in Educ., Report No. RR-014, 1989) (stating that school reforms of the 1980s have had only “modest” beneficial impact); Julie Johnson, *Bush Will Back National Goals on Education*, N.Y. TIMES, Sept. 24, 1989, at 24 (quoting statement by Roger Porter, domestic policy advisor to President George Bush, that, recent reforms notwithstanding, “we have seen little if any improvement”); Julie A. Miller, *Bennett: Despite Reform, “We Are Still at Risk”* EDUC. WEEK, May 4, 1988, at 15. President Bush and the governors of all fifty states unanimously adopted a “Jeffersonian Compact on Education” calling for development and implementation in the 1990s of “an ambitious, realistic set of [national] performance goals” that provides “a common understanding and a common mission” for all schools in the nation. “*A Jeffersonian Compact: The Statement by the President and Governors*, N.Y. TIMES, Oct. 1, 1989, at E22 [hereinafter *Jeffersonian Compact*].

116. *See, e.g.*, RAVITCH, *supra* note 16, at 408–15.

117. *See, e.g.*, CHUBB & MOE, *supra* note 12, at 197–98. Among the effects attributed to high-stakes minimum-competency tests were numbing constraints imposed on curriculum and teaching methods by the need to enable children above all else to pass tests; the devaluation of such untestable subjects and goals as writing, graphic and performing arts, critical thought, problem solving, creativity, and leadership; repression of bright students; de-emphasis on learning for its own sake and trivialization of knowledge and thinking into matters of multiple choice; and the devolution of control over education from the local to the state level of government. *See, e.g.*, COMM. OF CORRESPONDENCE, *Education for a Democratic Future*, in GREAT SCHOOL DEBATE, *supra* note 114 at 374, 381–83; BARRIERS TO EXCELLENCE, *supra* note 108, at 47; Graham Down, *Assassins of Excellence*, in GREAT SCHOOL DEBATE, *supra* note 114 at 273, 278 (characterizing minimum competency testing as a “new version of mediocrity masquerading as excellence”); Walter Haney & George Madaus, *Searching for Alternatives to Standardized Tests: Whys, Whats, and Whithers*, 70 PHI DELTA KAPPAN 683 (1989).

evaluation that, intentionally or not, lent official weight to, and thereby aggravated, the consequences of deprivation and racism.<sup>118</sup>

But conversely and crucially, the standards movement created an implicit alliance among, and allowed the mutual recognition of, those for whom the battle for improved school performance was a goal in itself, and not primarily an occasion to demonstrate the superiority of market over plan, or vice versa. For many in the pragmatic middle, the new arrangements suggested the broad outline of a more effective system of governance that increased possibilities for system-wide learning while heightening accountability.

The emergent consensus took early form in monographs prepared by university-based educational research centers funded by the federal government beginning in the mid-1980s.<sup>119</sup> It was further articulated in meetings orchestrated by the National Governors Association and then between the Governors and the first President Bush in Charlottesville in 1990.<sup>120</sup> The clearest expression of the consensus was *Raising Standards for American Education*, a report by the National Council on Education Standards and Testing.<sup>121</sup>

According to this report, standard-setting should be by mechanisms that are nonfederal ("To maintain the Nation's tradition of state and local authority over education, any new oversight entity should be part of a cooperative national

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118. See, e.g., Jones et al., *supra* note 19, at 199–203; Liebman, *supra* note 94, at 374–77 & nn.98, 100, 104 (citing sources); McNeil & Valenzuela, *supra* note 19; HIGH STAKES, *supra* note 19. According to this critique, performance standards were used to mark poor and minority children as failures and thereby deprive them of higher educational and employment opportunities. See, e.g., BARRIERS TO EXCELLENCE, *supra* note 108, at 46; Edward L. McDill, Gary Natriello & Aaron M. Pallas, *A Population at Risk: Potential Consequences of Tougher School Standards for Student Dropouts*, 94 AM. J. EDUC. 135 (1986) (expressing concern about the negative self-concept caused by the failure to satisfy performance standards and the anticipated denial of the only tangible benefit disadvantaged students have to gain from competing in school will "push" those students out of school); Robert C. Serow, *Effects of Minimum Competency Testing for Minority Students*, 16 URB. REV. 67, 73–74 (1984) (finding that African-Americans have a substantially lower pass rate than other groups on minimum competency tests and are disproportionately likely to be sanctioned by loss of diploma for failure to pass tests).

119. See, e.g., Jennifer A. O'Day & Marshall S. Smith, *Systemic Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATION POLICY 251 (Susan H. Fuhrman ed., 1993); Stewart C. Purkey & Marshall S. Smith, *School Reform: The District Policy Implications of the Effective Schools Literature*, 85 ELEM. SCH. J. 353 (1985); Marshall S. Smith & Jennifer O'Day, *Systemic School Reform*, in THE POLITICS OF CURRICULUM AND TESTING, 1990 Yearbook Pol. Educ. Ass'n 234 (Susan H. Fuhrman & Barbara Malem eds., 1991); Marshall S. Smith, Jennifer O'Day & David K. Cohen, *A National Curriculum in the United States*, 49 EDUC. LEADERSHIP 74 (1991); Michael S. Smith, *Selecting Students and Services for Chapter I*, in FEDERAL AID TO THE DISADVANTAGED: WHAT FUTURE FOR CHAPTER I? 119 (Denis P. Doyle & Bruce S. Cooper eds., 1998); see generally Maris A. Vinovskis, *An Analysis of the Concept and Uses of Systemic Education Reform*, 33 AM. EDUC. RES. J. 53, 56–61 (1996).

120. See Vinovskis, *supra* note 119, at 56; sources cited *supra* note 115.

121. NAT'L COUNCIL ON EDUC. STANDARDS AND TESTING, *RAISING STANDARDS FOR AMERICAN EDUCATION* 34 (1992) [hereinafter *RAISING STANDARDS FOR AMERICAN EDUCATION*]. The ad hoc council was chaired by two governors, Roy Romer of Colorado and Carol Campbell, Jr. of South Carolina. Its membership was a high-level microcosm of the ideological and professional diversity that would characterize the broad state-level reform movements we will examine below.

effort”) and broad-based (“The coordinating structure should be bipartisan, engage government at all levels, and involve the many constituencies that have an interest in improving education”).<sup>122</sup> Subject to these principles, the Council urged the development of nationally applicable standards for content, student performance, school delivery, and system performance. Particularly with respect to school delivery standards—criteria for measuring whether a school provides the services students need to meet substantive performance standards—the authors of the report contemplated peer reviews, thus anticipating some of the most important later developments.<sup>123</sup>

The upshot was a partial shift from global performance measures to internal, strategic, or diagnostic standards that assess both student and institutional performance, and prompt debate about their improvement.<sup>124</sup> The former focus on outcomes; the latter focus on the practices that together are expected to improve overall performance. Performance measures tend to be low-dimensional, using one aspect of a competence as a proxy for the others: The right answer to a multiple choice question indicates mastery of the body of knowledge the question tests. Diagnostic standards are high-dimensional, using a portfolio of diverse tests and other demonstrations to measure the various components of a particular competence. Students of trigonometry might be asked in distinct steps to resolve the structure of a roof into a series of triangles, to explain how in general to calculate the unknown length of one side of one of these triangles given the length and angles of intersection of the others, and finally to make the calculation by inserting the actual value of the variables into the formal equation describing the abstract relations. A business analogue to performance standards

122. *Id.*

123. In regard to the simultaneously state and national status of the standards, consider the following testimony about the *Raising Standards for American Education* report:

The school delivery standards, on the other hand, would be developed collectively by the States. Now, what is something that’s developed collectively by the States? That certainly seems to be national to me. It’s a different form of national. It is collectively by the States and then used by the States themselves to oversee, to audit the kinds of schools, to ensure the kinds of opportunities to learn that’s called for in the report.

*Subcomm. on Elementary, Secondary, and Vocational Educ.: Oversight Hearings on the Report of the Nat’l Council on Educ. Standards and Testing*, 102d Cong. 102–105, at 50 (1992) (testimony of Marshall S. Smith, Dean, School of Educ., Stanford Univ., Member, Nat’l Council on Educ. Standards and Testing).

124. See, e.g., Liebman, *supra* note 94, at 376 n.102; Diane Massell et al., *Persistence and Change: Standards-Based System Reform in Nine States*, CPRE POL’Y BRIEFS (Consortium for Pol’y Research in Educ., RB-21, March 1997). For a thoughtful criticism of performance standards used in isolation and a guide to their use as diagnostic assessments, see COMM’N ON TITLE I TESTING AND ASSESSMENT, NAT’L RESEARCH COUNCIL, TESTING, TEACHING AND LEARNING: A GUIDE FOR STATES AND SCHOOL DISTRICTS 22–101 (Richard F. Elmore & Robert Rothman eds., 1999). For a review of the different accountability systems that distinguishes sharply between the use of standards for punitive high-stakes evaluation of individual students and for diagnosis of possibilities for school reform and professional development, see Linda Darling-Hammond, *Transforming Urban Public Schools: The Role of Standards and Accountability*, at <http://www.ksg.harvard.edu/urbanpoverty/Sitepages/UrbanSeminar/UrbanEd/standards.pdf> (last visited Nov. 22, 2003).

is the price-earnings ratio of a corporation's equity, or its year-over-year quarterly earnings. Business analogues to strategic or diagnostic measures are the number of times a firm turns over its inventory each year, the time it takes to get a product from development to market, and the error or scrap rates of its manufacturing facilities.<sup>125</sup>

Both performance and diagnostic standards can be either keyed to the particularities of small groups—local—or applicable to encompassing groups—general. By the early 1990s, a number of influential educators had come to see general, diagnostic standards—elaborated, in the most thoughtful versions, through federal-state collaboration<sup>126</sup>—as the key to “systemic reform,” meaning the comprehensive restructuring of school systems.<sup>127</sup>

When it first came into circulation, “systemic reform” was no more than an informed intuition that for most schools and states was a distant goal, not an imminent reality.<sup>128</sup> For standards-based reform to become truly systemic, standards not only had to be generalized among states and nationally. In addition, they had to be complemented by changes in classroom instruction, teaching as a profession and the organization of schools and districts. Under some circumstances, these coordinate changes might have developed as implications of the standards themselves. But in the event, the changes in the practice and profession of teaching and in the organization of the institutions most directly associated with them resulted from the complex interaction between changes in the movement for standards-based reform and a sustained ground-level protest against the status quo led largely by American teachers themselves.

*B. Bottom-Up Reform: From the School as Teachers' Cooperative  
to the District as Accountable Learning Community*

*1. Networks and Small Schools: The Professional Collegium*

Just as evidence that schools were short-changing students gave rise to the standards movement at the state and national levels, the lived experience of failure in classrooms and schools triggered a ground-level movement of pro-

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125. In theory, improvement on the strategic measures leads to improvement on global outcomes, even though there is no robust theory of the connection between the two before the link is actually established. For an account of how apparently isolated strategic improvements can produce an encompassing change in organization, see FREDERICK H. ABERNATHY ET AL., *A STITCH IN TIME: LEAN RETAILING AND THE TRANSFORMATION OF MANUFACTURING—LESSONS FROM THE APPAREL AND TEXTILE INDUSTRIES* (1999).

126. See Vinovskis, *supra* note 119; Smith, *supra* note 123.

127. See Vinovskis, *supra* note 119.

128. Such systemic reform as occurred in the 1990s took place at the state level, with few demonstrable results. Exchanges among states were facilitated by the federally-funded research institutes and by grants from the U.S. Department of Education to develop and support standards-based reforms. Fitful efforts were also made to align federal programs with state reforms. See *infra* note 201 and accompanying text.

fessional protest. This movement took as its starting point three assumptions familiar to American education since the days of John Dewey. The first is that "human beings," teachers no less than children, "are by nature social, interactive learners. We observe how others do it and see if it works for us."<sup>129</sup> Second, and consequently, the role of teachers is to learn from one another how these general propensities are manifested in the inclinations and aptitudes of every single student and to discover thereby a means of connecting each individual to the community of learners that is the school. Third, the existing school hierarchy, which imposed a uniform curriculum and a uniform rule-bound method for propagating it, was the enemy of both the natural inclination to learn cooperatively from life and the teacher's obligation to personalize instruction as the precondition for this social-worldly education.

Understood this way, teaching is a craft. Just as apprentices eventually learn to solve novel problems on their own by watching master craftsmen use their tools and materials, so the novice teacher learns to teach a class that attends to the individuality of all its pupils by emulating those who have already mastered this particular art. Just as the only authority that craftspeople truly respect is the community of people who have mastered their trade, so the only authority that the master teacher acknowledges is the collegium of her peers.

Given this understanding of teaching, and the manifest failure of the then-current system, the program of reform was simply and urgently to free classrooms from the tyranny of educational hierarchies, affording the talented and dedicated teachers still in the system the collegial discretion they needed to fulfill their professional responsibilities to their pupils and society. In practice, this reform program took one of two explicitly anti-hierarchical forms.

The first was the network of geographically dispersed schools whose faculty and administration committed themselves to the core principles of reform and acknowledged a collegial obligation to learn from each other's successes and failures. A leading example of such a network was the Coalition of Essential Schools that grew largely out of the work of TheodoreSizer. Sizer had been headmaster of Philips Academy, then dean of the Harvard Graduate School of Education. His *Horace's Compromise*, published in 1984, depicts a world of talented but frustrated teachers who fitfully satisfy deep passions—reading Shakespeare, exploring etymology, building stage sets—at the cost of conformity to a standardized education that was indifferent to the increasingly diverse needs of the student body. This compromise was possible for the same reason that no alternative seemed feasible: Students and the wider public acquiesced in current arrangements. Horace, the eponymous every-teacher who inspires the book, knows that, whatever happens, "[n]o one seems upset. Just let it all continue, a conspiracy, a toleration of a chasm between the necessary and the provided and acceptance of big rhetoric and little reality."<sup>130</sup>

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129. DEBORAH MEIER, *THE POWER OF THEIR IDEAS* 153 (1995).

130. THEODORE R. SIZER, *HORACE'S COMPROMISE* 21 (3d ed. 1992).

To rally the nation's Horaces, the network of "essential schools" "focused on the 'triangle' of students, teachers, and the subjects of their study."<sup>131</sup> Affiliated schools followed imperatives such as: "Give room to teachers and students to work and learn in their own, appropriate ways"; "Focus the students' work on the use of their minds"; "Keep the structure simple and thus flexible."<sup>132</sup>

The second organizational expression of the movement of professional protest was the small, humanly-scaled schools. Here professional collegiality could be taken to its institutional limit. The school was to be no bigger than the collegium of reform-minded teachers who constituted and ideally governed it. The best known and most influential example of this line of development was the small group of Central Park East schools, together going from kindergarten through twelfth grade, created under the leadership of Deborah Meier in East Harlem beginning in 1974.<sup>133</sup> Meier started teaching in kindergarten and for her, like many inspired by Dewey's thought, the caring kindergarten teacher is the model of the successful pedagogue.<sup>134</sup>

Kindergarten is the one place—maybe the last place—where teachers are expected to know children well, even if they don't hand in their homework, finish their Friday tests, or pay attention. Kindergarten teachers know children by looking and listening. They know that learning must be personalized because kids are incorrigibly idiosyncratic. . . . Catering to children's growing independence is a natural part of a kindergarten teacher's classroom life.<sup>135</sup>

As the failures of the New York City public school system became notorious in the 1970s and 1980s, Meier used the system's growing toleration of "alternative" or "choice" schools, particularly in poor and poorly-served areas, to

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131. *Id.* at 5.

132. *Id.* at 214. See COALITION OF ESSENTIAL SCHOOLS, ABOUT THE COALITION OF ESSENTIAL SCHOOLS, at [http://www.essentialschools.org/pub/ces\\_docs/about/about.html](http://www.essentialschools.org/pub/ces_docs/about/about.html) (last visited Nov. 22, 2003) ("The Coalition of Essential Schools is a national network of schools, regionalized centers, and a national office, working to create schools where intellectual excitement animates every child's face, where teachers work together to get better at their craft, and where all children flourish, regardless of their gender, race, or class." "[C]ommon principles," promoted by the Coalition's publication, *Horace*, include "[p]ersonalized instruction to address individual needs and interests," "[s]mall schools and classrooms, where students and teachers know each other well and work in an atmosphere of trust and high expectations," and "[m]ultiple assessments based on performance of authentic tasks").

133. MEIER, *supra* note 129.

134. See, e.g., JOHN DEWEY, THE SCHOOL AND SOCIETY AND THE CHILD AND THE CURRICULUM 116–31 (Univ. of Chi. Press 1990) (1899) ("[I]n a certain sense, the school endeavors throughout its whole course—now including children from ages four to thirteen—to carry into effect certain principles which [Friedrich] Froebel was perhaps the first consciously to set forth"; Froebel is regarded as the intellectual progenitor of the modern kindergarten); JOHN DEWEY, DEMOCRACY AND EDUCATION (1916). For Dewey's different view towards the end of his life, see JOHN DEWEY, EXPERIENCE AND EDUCATION (1938), discussed *infra* notes 196 and 197 and accompanying text.

135. MEIER, *supra* note 129, at 48.

establish first elementary and middle schools and then a high school that applied the core principle of collegial attention to individual student needs. Within the limits set by citywide rules, the staff in Meier's school hired and assessed their own colleagues. They also took responsibility for developing and evaluating the curriculum and students' progress with it.<sup>136</sup>

Ideally, Meier's collegium would have been a "principal-less collective." But in time, as Meier's activities in the classroom decreased and her administrative responsibilities grew, the "staff-run" school acquired a principal.<sup>137</sup> With respect to other stakeholders in the new small schools, Meier and the staff were careful to maintain their autonomy:

Our experience suggested that a strong school culture requires that most decisions be struggled over and made by those directly responsible for implementing them, not by representative bodies handing down dictates for others to follow. We felt the same way whether the representative bodies were composed of kids, parents, or fellow teachers.<sup>138</sup>

The idea of the collegial school also found expression in a distinctive form of evaluation of student work: the portfolio. As evidence that they had mastered the curriculum and become independent learners, and as a condition of graduation, students were expected to present and defend before a committee of teachers an elaborate project largely of their own choosing. This method of evaluation was shaped by the experience of the Coalition of Essential Schools, and in this regard as well as others, Meier recognizes inSizer a kindred spirit.<sup>139</sup> This preference for an individualized form of evaluation goes hand in hand with a vehement rejection of standardized tests in almost any form.<sup>140</sup>

## 2. *Towards the District as an Accountable Learning Community: Community School District 2*

Had the professional protest movement stopped with these initiatives, it might have produced at best a few archipelagoes of successful reform in a sea of pedagogic drudgery and despair. But the ideas that shaped the Coalition for Essential Schools and Meier's staff-run schools in East Harlem inspired more encompassing reforms that redefined the role of the teacher and principal, as well as the utility of educational standards and the corresponding tests. One result is innovative classroom practices that institutionalize attention to individual students. Another is a novel conception of professional development that makes continuing mutual education for teachers a lever for reorganizing schools

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136. *See id.* at 56.

137. *Id.* at 25.

138. *Id.* at 24.

139. *Id.* at 29, 57. Compare Meier's views to those of the Sizer-inspired Coalition of Essential Schools, which are summarized *supra* note 132.

140. *See* DEBORAH MEIER, WILL STANDARDS SAVE PUBLIC EDUCATION? (2000). *See also* SIZER, *supra* note 130, at 215.

and districts in response to (ever more refined) diagnoses of their shortcomings. As we will see, these apparently local developments can provide an invaluable ground-level complement to systemic, standards-based reform when governance changes: Typically, the implementation of sophisticated, diagnostically focused accountability systems makes better educational outcomes an urgent imperative for school districts and states across the nation.

The most influential and carefully studied instance of this transformation of professional protest is Community School District 2 in Manhattan. At the southern boundary of Deborah Meier's District 4, District 2 includes fifty elementary, intermediate, junior high, and option (theme) schools in some of New York's richest and poorest neighborhoods. As of 1997, 29% of its 22,000 students were white, 14% African-American, 22% Hispanic, 34% Asian, and less than 1% Native American. About half the District's students are from families with incomes below the poverty level; about 20% speak English as a second language.<sup>141</sup>

The key link between District 2 and the reform movement was Anthony Alvarado. After serving ten years as superintendent of District 4 (starting almost from the inception of Meier's reform efforts), Alvarado was briefly chancellor of the entire New York City school system, then became superintendent of District 2. His aspiration was to apply at the district level the ideas that had seemed to work well, but only in isolated schools, in District 4. "If change is scattershot, and primarily bottom-up," Alvarado would later say, "it will involve only those who perceive a need, and it will yield only small, separate successes."<sup>142</sup> Alvarado also recognized, however, that "[i]f change is mandated from the top, without substantive input from those who must carry it out, it will meet resistance and resentment."<sup>143</sup> His solution was to create a collegium of like-minded principals, each accountable for improving instruction in his or her own school and able to guide and learn from the others. The goal became to create "a learning community" that connected, and thus opened up to each other, the classroom, the school and the district.<sup>144</sup>

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141. See RICHARD F. ELMORE & DEANNA BURNEY, *SCHOOL VARIATION AND SYSTEMIC INSTRUCTIONAL IMPROVEMENT IN COMMUNITY SCHOOL DISTRICT 2, NEW YORK CITY 3* (1997) (hereinafter *SCHOOL VARIATION*).

142. KATE MALOY, *BUILDING A LEARNING COMMUNITY: THE STORY OF NEW YORK CITY COMMUNITY SCHOOL DISTRICT #2*, at 3 (May 1998), available at <http://www.lrdc.pitt.edu/hplc/publications/building%20portrait.pdf>. See also *SCHOOL VARIATION*, *supra* note 141, at 10 (describing District 2's assumption "[t]hat big effects on student performance, in the aggregate, can be achieved only by a concerted, system-wide effort at instructional improvement organized around common principles of learning, and not by 'random innovation' in semi-autonomous schools.>").

143. MALOY, *supra* note 142, at 5.

144. *Id.*; see also Anthony Alvarado, *Professional Development Is the Job*, *AMERICAN EDUCATOR*, Winter 1998, available at [http://www.aft.org/american\\_educator/winter98/professional-development.html](http://www.aft.org/american_educator/winter98/professional-development.html); MARY KAY STEIN ET AL., *UNIV. OF PITTSBURGH, OBSERVATIONS, CONVERSATIONS, AND NEGOTIATIONS: ADMINISTRATOR SUPPORT OF LITERACY PRACTICE 6-7* (1998).



The work of this collegium was deeply influenced by approaches such as "Balanced Literacy," developed at Ohio State University and Leslie College.<sup>145</sup> These methods begin with the observation that a complex task, such as the mastery of literacy, requires the combination of different cognitive strategies: for example, the ability to decode words and sentences from sequences of letters (phonics) and to grasp the meaning of words and sentences from their respective contexts (the "whole language" concept). Individual students are typically better at some of these strategies than others. Because each student is achieving mastery by applying an idiosyncratic bundle of skills, the teacher's job is to find ways of continuously assessing each student's assembly of strategies and to suggest new ones for overcoming the weaknesses.<sup>146</sup> To do this, the teacher must, to continue the literacy example, select books demanding enough to reveal difficulties in individual learning strategies, but not so demanding as to crush the pupil's hope of progress. Balanced Literacy calls the selection of such "graded" materials "Guided Reading."<sup>147</sup>

The orientation towards the collegium of principals and the improvement of instruction through close attention to and guidance of the students' own learning strategies eventually resulted in three interlocking changes that distinguished District 2 from the more isolated professional collegia advocated bySizer and Meier. The first, most obvious change was organizational. In the traditional school, the principal enforces the district-wide rules and policies in the school. Order, not high academic achievement, is proof of good management. This puts the teacher at the bottom of a pyramid at the apex of which sits the superintendent.<sup>148</sup>

In District 2, the pyramid is inverted. The teacher gets better at classroom instruction. The principal makes it possible for teachers to achieve these improvements and holds them accountable if they do not. The superintendent, acting through the district, holds the principals in their turn accountable for providing the right kind of enabling infrastructure and professional discipline.<sup>149</sup>

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145. See, e.g., IRENE C. FOUNTAS & GAY SU PINNELL, *GUIDED READING: GOOD FIRST TEACHING FOR ALL CHILDREN* 1 (1996). See also Tucson Unified School District website, at <http://instech.tusd.k12.az.us/balancedlit/handbook/bloview.htm> (last visited Nov. 22, 2003) (summarizing the District's Balanced Literacy Program).

146. See KATE MALOY, *THE HEART OF THE MATTER: PROFESSIONAL DEVELOPMENT IN NEW YORK COMMUNITY SCHOOL DISTRICT #2*, at 8–10 (1998) (summarizing the components of Balanced Literacy).

147. See *id.* at 11–20; FOUNTAS & PINNELL, *supra* note 145; SHARON TABERSKI, *ON SOLID GROUND: STRATEGIES FOR TEACHING READING, K–3*, at 2–8 (2000); Shelley Harwayne, *Foreword* to TABERSKI, *supra*, at xi–xii.

148. See RICHARD F. ELMORE, *BUILDING A NEW STRUCTURE FOR SCHOOL LEADERSHIP* 5–8 (2000), available at <http://www.shankerinstitute.org/Downloads/building.pdf> [hereinafter *SCHOOL LEADERSHIP*]; INSTITUTE FOR EDUCATIONAL LEADERSHIP, *SCHOOL LEADERSHIP FOR THE 21ST CENTURY INITIATIVE TASK FORCE ON THE PRINCIPALSHIP, LEADERSHIP FOR STUDENT LEARNING: REINVENTING THE PRINCIPALSHIP* 2–3 (2000).

149. See, e.g., RICHARD F. ELMORE, *INVESTING IN TEACHER LEARNING: STAFF DEVELOPMENT AND INSTRUCTIONAL IMPROVEMENT IN COMMUNITY SCHOOL DISTRICT #2, NEW YORK CITY* 22–25

A new understanding of professional development—continuing education for teachers—and the recruitment and training of principals reinforced this inversion of traditional organization. Professional development typically is a form of intellectual or cultural enhancement for practicing teachers. It takes place off the school site in a seminar that exposes the teacher to new thinking in his or her field, or about some aspect of contemporary education or contemporary life in general. Its relevance to current practice in the classroom is not clear. In fact, to teachers bored or frustrated by what they experience in the classroom, professional development is often interesting precisely to the extent that it does not address everyday affairs. Even if the subject presented were palpably relevant to reform, it is unclear how the teacher could put it to actual use given the organizational constraints that normally inhibit classroom-level change.<sup>150</sup>

Professional development in District 2, in contrast, focuses on improving classroom practice as exemplified in the detection and correction of weaknesses in students' reading strategies central to the program in Balanced Literacy. Professional development accordingly usually takes place on site, at the school. It is regular and frequent, not episodic.<sup>151</sup> In District 2, professional development is much more likely to be guided by a master teacher, peer mentor or on-site or district-based specialist than an outsider whose expertise is in the popularization of advanced professional knowledge for frontline colleagues.<sup>152</sup> Indeed, current observation of professional development in District 2 suggests that the prototypical developer is becoming less a master teacher or educational expert than a facilitator who matches and makes interactions administratively possible between teachers within and across schools who can learn from each other.<sup>153</sup>

Because professional development in District 2 is so tightly connected to classroom practice and so woven into the fabric of professional association, it changes not only what teachers do in the classroom but also the nature of collegiality and the organization of the school and district themselves. Take collegiality first. Teachers visit each other's classes in turn. In some programs, visits can be for as long as three weeks at a stretch. If the key to professional success in Horace's world is decorous conformity,<sup>154</sup> and in the Sizer-Meier

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(1997) [hereinafter *INVESTING IN TEACHER LEARNING*]; *SCHOOL LEADERSHIP*, *supra* note 148, at 20–21.

150. See, e.g., RICHARD F. ELMORE, *BRIDGING THE GAP BETWEEN STANDARDS AND ACHIEVEMENT: THE IMPERATIVE FOR PROFESSIONAL DEVELOPMENT IN EDUCATION* 28–33 (2000); MALOY, *supra* note 146, at 3–4.

151. See *INVESTING IN TEACHER LEARNING*, *supra* note 149, at 12–21; MALOY, *supra* note 146, at 5–8.

152. See *INVESTING IN TEACHER LEARNING*, *supra* note 149, at 15–21.

153. Tony Fong, *Professional Development in District #2* (Nov. 12, 2002) (paper on file with NYU Review of Law & Social Change).

154. See MALOY, *supra* note 146, at 5–6; *INVESTING IN TEACHER LEARNING*, *supra* note 149, at 13–18; SIZER, *supra* note 130 and accompanying text.

reform collegium is responsiveness to the individual needs of all the students,<sup>155</sup> in District 2 it is assessment of the work of others and open response to such assessments of oneself.<sup>156</sup>

This new collegiality reshuffles organizational roles immediately, and more and more profoundly as time goes on. In the traditional school, teachers teach; supervisors evaluate their work. By traditional standards, therefore, teachers evaluating each other are exercising a crucial *supervisory* task. In the longer term, this mutual scrutiny uncovers and proposes remedies for defects in the school's organization.<sup>157</sup> Many of the obstacles that teachers encounter when trying to improve their classroom practices originate in what other teachers have taught students previously, or in the way the school day is organized. When the new professional development produces a consensus in a school or district about the need for changes in these areas, the further education of teachers has become a mainspring of institutional reform, and teachers have become institutional designers, rather than compromised subordinates.<sup>158</sup>

Because principals participate in the same kinds of mutual visits and peer review as teachers, District 2's new professional development transforms the district as it transforms the district's constituent classrooms and schools.<sup>159</sup> Recognizing the connection between new career paths and new structures, District 2 makes persistent efforts to establish programs for training new principals in the skills they need to build schools that learn from classroom reform and vice versa.<sup>160</sup> Thus, as current District 2 superintendent Shelley Harwayne writes, "this is a district that asks principals to get good at teaching," while insisting, as we have just seen, that teaching includes serious attention to organizing schools to make for still better teaching.<sup>161</sup>

155. See *supra* notes 130–40 and accompanying text.

156. See, e.g., INVESTING IN TEACHER LEARNING, *supra* note 149, at 9–11.

157. See *id.* at 22 (discussing "the intentional blurring" in District 2 "of the boundaries between management of the system and the activities of staff development").

158. As Elmore notes, . . . the lines between traditional management functions (oversight, accountability, resource allocation, for example) and professional development are blurred in District 2. Much of what would be regarded in many systems as routine management has been folded into District 2's professional development strategy, and much of what would be regarded as professional development in many systems has been folded into management. So it is impossible to disentangle professional development from general management in District 2 because the two are, for all practical purposes, synonymous. . . . [P]rofessional development permeates the work of the organization, and the organization of the work.

*Id.* at 12. See also SCHOOL VARIATION, *supra* note 141, at 20–21.

159. See RICHARD F. ELMORE & DEANNA BURNEY, LEADERSHIP AND LEARNING: PRINCIPAL RECRUITMENT, INDUCTION AND INSTRUCTIONAL LEADERSHIP IN COMMUNITY SCHOOL DISTRICT #2, NEW YORK CITY 16–21 (2000).

160. See INVESTING IN TEACHER LEARNING, *supra* note 149, at 17–21; MALOY, *supra* note 146, at 6–8.

161. SHELLEY HARWAYNE, GOING PUBLIC: PRIORITIES AND PRACTICE AT THE MANHATTAN NEW SCHOOL 35 (1999).

The second interlocking development in District 2 that pushed it beyond existing professional collegia concerns standards. In the traditional school, no less than in the teachers' collegium and District 2 in Alvarado's early years, good teaching was what teachers recognized as good said it was. This was the natural extension of a craft understanding of teaching.<sup>162</sup> In a craft, only a master can judge mastery. But an outsider might ask if reformers could be sure they were improving teaching if they were not simultaneously inquiring whether students were learning more from the instructional improvements. By the mid-1990s, Alvarado concluded that the "only way you can answer that question is by getting agreement on what kids should know and be able to do and starting to assess their learning in some systematic way."<sup>163</sup> His chief concern was "that we had just about reached the limits of our previous focus . . . and I felt we weren't pushing hard enough on what students were actually learning and whether we were reaching the hardest-to-teach."<sup>164</sup>

District 2 hesitantly began, therefore, to embrace explicit performance standards measuring student learning.<sup>165</sup> In the 1995–1996 school year, Alvarado held principals accountable for ensuring that all students read at least twenty-five books a year. The next year the focus was on the creation and assessment of portfolios.<sup>166</sup> While these developments were in some large sense compatible with the kinds of standards embraced bySizer and Meier,<sup>167</sup> in the more open setting of District 2 they quickly led to adoption of diagnostic standardized tests that allow detailed comparison of the performance of schools, teachers and students in literacy and mathematics.<sup>168</sup>

The third major change in District 2's orientation, the creation of a network of "Focused Literacy" schools, was an emphatic extension of the first two. In a direct effort to improve test scores at low-performing schools, the Focused Literacy program explicitly reorganized the school and reapportioned the teachers' time budgets according to the principles of the previously adopted Balanced Literacy program.<sup>169</sup> Seven schools started with Focused Literacy in

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162. See *supra* notes 129–32 and accompanying text.

163. INVESTING IN TEACHER LEARNING, *supra* note 149, at 24 (quoting interview with Anthony Alvarado, Superintendent, November 15, 1995). See MALOY, *supra* note 142, at 15–16.

164. RICHARD F. ELMORE & DEANNA BURNEY, CONTINUOUS IMPROVEMENT IN COMMUNITY DISTRICT #2, NEW YORK CITY 9 (1998) [hereinafter CONTINUOUS IMPROVEMENT] (quoting Alvarado).

165. See SCHOOL VARIATION, *supra* note 141, at 10 ("The central tenet of [District 2's] standards-based instructional improvement is that entire systems of schools can move collectively in the direction of more ambitious teaching and learning through a focus on common principles of instructional practice, explicit standards for student learning, and assessments that accurately capture instruction and learning.").

166. CONTINUOUS IMPROVEMENT, *supra* note 164, at 13.

167. See MEIER, *supra* note 140, at 5–6, 17, 19–29; SIZER, *supra* note 130, at 215–16, 226–27; *supra* notes 139–40 and accompanying text.

168. See New Standards website, at [www.hemweb.com/trophy/perfermn/newstan.htm](http://www.hemweb.com/trophy/perfermn/newstan.htm) (summarizing New Standards Reference Examination).

169. See *supra* notes 145–47 and accompanying text (discussing Balanced Literacy).

1996–1997. By 1998–1999, there were thirteen (out of fifty) schools in the network, all with a high proportion of low-performing students. These schools devoted at least two and one-half hours per day to literacy instruction, compared to an hour per day in other District 2 schools.<sup>170</sup> Teachers in these schools receive especially intensive professional development in using the Balanced Literacy approach. Their schools and classrooms are monitored more closely and visited more frequently by district-level officials. Their principals are expected to organize professional development and the school generally to accommodate this intensity.<sup>171</sup> Given the goal of improving the test scores of the low-performers, the daily monitoring of individual student reading came to be meshed well with periodic review of teacher performance by principals and of principals by district personnel, all in the light of scores on various tests.<sup>172</sup>

The Focused Literacy program is controversial in District 2 because of this intensity of teacher involvement.<sup>173</sup> In Balanced Literacy, the teacher is a facilitator who helps the student discover shortcomings in her learning strategy and ways to overcome these.<sup>174</sup> Teaching can still be thought of as the craft of responding to the naturally inquiring child.<sup>175</sup> But the more structured the teacher's scrutiny of the child's strategic shortcomings, and the more explicit the discussion between teacher and student of strategies for improvement, the greater the risk that the teacher becomes domineering and instruction becomes invasive. Learning becomes "teacher-centered" rather than child-centered as the pupil responds to tasks and pursues goals over which she has no control.<sup>176</sup>

With regard to both teaching and professional development, however, the closest outside observers of the district have concluded that the new network of Focused Literacy schools is best understood as having intensified the district's

170. See CONTINUOUS IMPROVEMENT, *supra* note 164, at 18.

171. See *id.*

172. Deputy Superintendent Elaine Fink championed the introduction of Focused Literacy Schools and became Superintendent when Alvarado left. She recalls telling those principals in her Focused Literacy working group with a majority of students testing in the lowest two score categories: "Figure out who those kids are by name, which classrooms they're in with which teachers, the practices that the teacher is engaged in, and which staff development their involved in. And you need to meet with those teachers regularly to talk about the movement of those kids—and keep your hands on it." ELAINE FINK & LAUREN B. RESNICK, *DEVELOPING PRINCIPALS AS INSTRUCTIONAL LEADERS* (2000).

173. See *id.* at 17–18.

174. See Tucson Unified School District website, *supra* note 145:

- The teacher acts as a facilitator who sets the scene, arouses interest, and engages students in discussion that will enable them to unfold the story line and feel confident and capable of reading the text themselves.
- Guided reading is reading by students. The students are responsible for the first reading of the text.

175. See *supra* notes 129–40 and accompanying text.

176. See CONTINUOUS IMPROVEMENT, *supra* note 164 at 20 (discussing some District 2 teachers' skeptical view of Focused Literacy as "a discernible shift in emphasis in the district's literacy strategy, away from the less teacher-centered and prescriptive parts of Balanced Literacy to the more teacher-centered and prescriptive parts.").

general strategy for the benefit of the lowest-performing students.<sup>177</sup> Certainly, District 2's insistence upon maintaining the classroom as the fundamental unit of instruction in Focused Literacy schools strongly suggests continuing commitment to the ideal of education as a social activity best fostered in a community of learners.<sup>178</sup>

Even if Focused Literacy does not mark a shift in general strategy, the project does bring to light a fundamental ambiguity in the craft conception of teaching. From the craft perspective, systematic attention to students' learning strategies can be understood as a heightening of just that attentiveness to individual students at the center of the Sizer-Meier project of professional reform.<sup>179</sup> But it can also be interpreted as a self-defeating effort to formalize what cannot be formalized and make explicit what must remain tacit. Thus seen, the shift to Balanced and especially Focused Literacy makes the school and the teacher into instruments of ruthless public control over the inquisitiveness and life chances of defenseless children.

In extending the boundaries of the professional protest movement, officials in District 2 have taken great pains to reconcile the increasingly explicit, indeed formalized, discussion of standards and learning strategies with the craft view that still shapes the district's self-conception. Alvarado himself constantly emphasized that a shared vision of standards-based reform required continuous exercise of teacher autonomy to adapt the general principles to particular circumstances:

In this new world of standards-based learning, there are no uniform answers . . . . You have to ask yourself, what is the right answer for a particular situation and school. That decision has to be made in a context of standards-based education, and you can't think usefully unless every teacher, every principal, every district office member, and, most important, every student, has a focused, coherent, and common vision of what is expected of them in standards-based classrooms.<sup>180</sup>

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177. *See id.* at 21.

178. In this regard, Focused Literacy may be compared to "Reading Recovery," another adjunct to Balanced Literacy, which instead uses tailored "pull-out" workshops for low-performing readers. *See* FOUNTAS & PINNELL, *supra* note 145, at 194–98 (describing Reading Recovery).

179. *See supra* notes 129–40 and accompanying text.

180. Alvarado, *supra* note 144, at 2. Another illustration is Shelley Harwayne's forward to Sharon Taberski's Balanced Literacy teacher's guide. Harwayne, *supra* note 147. Taberski's guide is nothing if not systematic. Among its many detailed charts and forms, for example, is a diagram specifying how a teacher can rotate students from seat to seat around a small table to sample the reading of each in the class period. TABERSKI, *supra* note 147, at 43. Another develops a notation scheme for categorizing revealing reading episodes, such as a child's "repetitions" or "skips and returns." *Id.* at 48. In her introduction, however, Harwayne—whose office as principal of the Manhattan New School (before Harwayne became the district's third reform superintendent) was right across from Taberski's classroom—emphasizes not the detailed techniques but rather the extraordinary attentiveness to the process of teaching that they demonstrate and enable. Harwayne writes:

When I think about Sharon Taberski, and what I've learned from her over the last

Richard Elmore and Deanna Burney, two of the most astute and sustained academic observers of District 2, also elide these two interpretations of developments in District 2. On the one side they are persuasive in underscoring the district's organizational innovations and especially its institutionally transformative use of professional development.<sup>181</sup> On the other, they have consistently conceptualized the changes they have observed in terms of a literature closely analyzing professionals—architects, lawyers and doctors—who solve problems by reflecting acutely on the mismatches between their habitual practices and the demands of the situation.<sup>182</sup> This literature is closely related to theSizer-Meier school of reform through self-aware professional collegia, and like those two reformers (but unlike District 2) sees the small informal group—essentially an anti-organization—as the ideal setting for the “reflective practitioner.”<sup>183</sup>

Recent evaluations of the effect of reform on student performance support the view that it is the routine, organized attention to individual learning, not the culture of attentiveness, that accounts for improvement in District 2. In a series of studies,<sup>184</sup> Professor Resnick and colleagues at the University of Pittsburgh

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several years, I am reminded of the difference between doing things on automatic pilot and pausing to examine our practice, searching for the better way. Sharon Taberski eloquently reminds us that there is no room for automatic pilot in the teaching of reading. We can no longer blindly follow steps in a manual or dish out prescribed dialogue from a teacher's edition. Nor can we simply fill our classrooms with the best children's literature and believe children will magically learn to read.

Harwayne, *supra* note 147, at xi. While Harwayne observes that Taberski's emphasis on helping the student integrate his or her own bundle of reading strategies should allow teachers and schools to avoid controversies over the relative merits of “phonics” as against “whole language,” *see id.* at xii, she is understandably more reticent about her own reading of the book as an effort to reconcile partisans of child-centered learning and advocates of more systematic reform. Harwayne's own book on her experience of the Manhattan New School, which she founded, has thoughtful chapters on “Turning the Schools into Centers for Professional Study” and “Reaching Out to Families,” but little on organizational detail—and nothing like the model charts and forms found throughout *On Solid Ground*. *See* HARWAYNE, *supra* note 161, at 153–198, 239–272.

181. *See, e.g.*, CONTINUOUS IMPROVEMENT, *supra* note 164, at 12–21; SCHOOL VARIATION, *supra* note 141, at 6–32.

182. For Elmore and Burney's elaboration of the work of Donald Schön and Chris Argyris, *see id.* at 16 & n.2 (citing CHRIS ARGYRIS & DONALD SCHÖN, ORGANIZATIONAL LEARNING II: THEORY, METHOD AND PRACTICE (1996)).

183. *See* DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). Elmore and Burney are not alone. Lauren Resnick, a prominent cognitive psychologist and consultant to District 2, and Elaine Fink, the district's architect of Focused Literacy and its second reform superintendent, couch their joint analysis of professional development in District 2 in a theoretical vocabulary explicitly derived from the study of the master-apprentice relationship in traditional crafts. RESNICK & FINK, *supra* note 172, at 7 (citing JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION (1991) and James G. Greeno et al., *Cognition and Learning*, in HANDBOOK OF EDUCATIONAL PSYCHOLOGY 15 (D. C. Berliner & R. C. Calfee eds., 1996)). In summarizing this background literature, Resnick and Fink are even more explicit about the connection between the movement for professional reform and the traditional crafts thanSizer and Meier.

184. *See* LAURA D'AMICO ET AL., EXAMINING THE IMPLEMENTATION AND EFFECTIVENESS OF A DISTRICT-WIDE INSTRUCTIONAL IMPROVEMENT EFFORT (April 14, 2001) [hereinafter EXAMINING THE IMPLEMENTATION] (paper presented at annual meeting of American Educational Research

hypothesized that successful professional development would lead to improved student outcomes. They assumed that the (reformed) professional culture *was* the (reformed) pedagogy.<sup>185</sup> But the expected relation proved to be weak at best.<sup>186</sup> In contrast, good classroom practices did lead to better outcomes: In those schools that principals and teachers rated as having most comprehensively implemented the Balanced Literacy program, classes did better on standardized tests than would have been predicted by the mean socioeconomic backgrounds of the students in the classrooms.<sup>187</sup>

These results are consistent with Harold Wenglinsky's recent methodologically innovative study of the effects of the current educational reforms.<sup>188</sup>

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Association); LAURA D'AMICO ET AL., PERSPECTIVES ON INSTRUCTIONAL IMPROVEMENT IN LITERACY AND MATHEMATICS (2000) [hereinafter PERSPECTIVES ON INSTRUCTIONAL IMPROVEMENT]; MICHAEL HARWELL ET AL., PROFESSIONAL DEVELOPMENT AND THE ACHIEVEMENT GAP IN COMMUNITY SCHOOL DISTRICT #2 (2000); LAUREN RESNICK & MICHAEL HARWELL, HIGH PERFORMANCE LEARNING COMMUNITIES: DISTRICT 2 ACHIEVEMENT (1998); MARY KAY STEIN ET AL., TOWARD CLOSING THE GAP IN LITERACY ACHIEVEMENT (1999).

185. See, e.g., HARWELL ET AL., *supra* note 184, at 23 (discussed *infra* note 187); RESNICK & HARWELL, *supra* note 184, at 18–19 (finding relatively high literacy achievement levels in District 2 schools and hypothesizing a link between that performance and “the effort in professional development”).

186. See D'AMICO ET AL., EXAMINING THE IMPLEMENTATION, *supra* note 184, at 22–25 (finding that various measures of the quality of professional community and professional development had no significant relationship to higher mean classroom achievement in literacy, nor any demonstrated capacity to overcome the predicted effects of student socioeconomic status (SES) on mean classroom achievement in literacy; disconcertingly, favorable assessments of school professional community were significantly related to an *increase* in the effect of student SES on mean classroom achievement in both literacy and mathematics); HARWELL ET AL., *supra* note 184, at 23 (puzzling over fact that administrator and teacher assessments of the quality of “professional development [did] not show more powerful effects in reducing the achievement gaps” between high- and low-SES students).

187. See D'AMICO ET AL., EXAMINING THE IMPLEMENTATION, *supra* note 184, at 22–25, 30, tbl.6 (“Basically, the findings suggest that the alignment of instructional practice to the Balanced Literacy program is associated with improved student outcomes. This is evidenced by the strong predictive power of principals’ judgments of alignment of instruction on mean classroom student achievement and by the finding that the link between students’ socio-economic status and their achievement is significantly weakened in those cases in which teachers report that Balanced Literacy plays an important role in their day-to-day professional lives.”); STEIN ET AL., *supra* note 184, at 22 (“In addition, the thirteen schools that comprise the Focused Literacy Network made larger gains in achievement than did the other schools in the district, implying a trend that, if continued, would point to the specific success of the district’s approach to identifying, monitoring, and assisting low-performing schools.”). Acculturation did, however, contribute indirectly to the outcome in that schools rated by their teachers as having high quality professional development were disproportionately likely to have comprehensively implemented the Balanced Literacy program. See D'AMICO, *supra* note 184, at 30 (concluding that “high quality professional development appears to be associated with both high quality and highly aligned instructional practice—and when instructional practice is highly aligned to the principles of the Balanced Literacy framework it appears to significantly weaken the links between student achievement and their socio-economic status (a nontrivial accomplishment).”).

188. Harold Wenglinsky, *How Schools Matter: The Link Between Teacher Classroom Practices and Student Academic Performance*, 10 EDUC. POL’Y ANALYSIS ARCHIVES 12 (February 13, 2002), at <http://epaa.asu.edu/epaa/v10n12/>. See also JOHN F. KAIN & DAVID M. O'BRIEN, BLACK SUBURBANIZATION IN TEXAS METROPOLITAN AREAS AND ITS IMPACT ON STUDENT ACHIEVE-



Work in this area has traditionally assessed the effectiveness of schools by measuring the effect on student test scores of changes in educational inputs such as improvement in teacher qualification, reduction in class size, or additional days of instruction.<sup>189</sup> But because the new reforms focus on classroom practices—especially students' ability to conceptualize problem-solving techniques—Wenglinsky studied the relation between those practices and student achievement.<sup>190</sup> He found that students who had practice applying general problem-solving techniques to unique problems perform markedly better on the eighth grade mathematics portion of the National Assessment of Educational Progress ("NAEP"), widely acknowledged as the gold standard of standardized tests, than students of a comparable socioeconomic status who have had no similar practice.<sup>191</sup> He further found that the combined effects of the relevant reforms in teaching and the professional development of teachers is greater than the contribution to performance of the students' social and economic status.<sup>192</sup> This is an extraordinary result given forty years of studies repeatedly finding that the effects of social and economic status on school performance dwarf any contribution of the school itself.<sup>193</sup>

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MENT (2000) (concluding that, everything else equal, placing African-American children in higher quality public schools in the Dallas area, measured by the schools' average achievement levels on standardized tests, diminished the gap between the scores of African-American and white children by twelve to thirty percent).

189. See Wenglinsky, *supra* note 188.

190. See *id.*

191. See *id.* In addition, and in keeping with the findings of Resnick and her colleagues, Wenglinsky found that some kinds of professional development tend to be associated with the adoption of these effective classroom practices and have a small independent effect on student achievement. *Id.*

192. See *id.*

193. See H. M. Levin & C. R. Belfield, *Families as Contractual Partners in Education*, 49 U.C.L.A. L. REV. 1799, 1801–1802 (2002) (summarizing the traditional findings).

In sum, developments in District 2 suggest a possibility not contemplated in the craft conception of teaching or openly allowed in the reform program based on it: Organization and formalization are not necessarily the enemies of sustained reflection on the strengths and weaknesses of learning by colleagues and students. Certain ways of formalizing inquiry into the problem-solving strategies of students and teachers and of explicating the results can do better by students than even the most attentive and reflective emulation of master teachers by apprentices. Likewise, certain forms of organization can facilitate this formalization.

Ironically, it was Leo Tolstoy, the Russian Romantic, not John Dewey, the American pragmatist and patron saint of progressive education, who relentlessly applied to teaching and teachers the pragmatist insight that the same contextual features of knowledge that make all methods imperfect also allow for their correction. In Dewey's later writings on education, he, too, edged towards this view. But he never entirely embraced it because of continuing attachments to the assumptions that defined his earlier work on education.

In the 1899 lectures *The School and Society*, Dewey had presented the progressive school as "a miniature community, an embryonic society."<sup>194</sup> By engaging the students with "occupations"—cotton ginning, spinning, weaving—the progressive school would recreate the experience of the family farm (then of recent memory), where "instead of pressing a button and flooding the whole house with electric light, the whole process of getting illumination was followed in its toilsome length from the killing of the animal and the trying of fat to the making of wicks and the dipping of candles."<sup>195</sup>

To many, including some of Dewey's own most ardent followers, this identification of school and community seemed to limit the teacher's role to setting the stage for learning: Once the students were grouped around the artifacts of an occupation, the teacher exited the scene, leaving natural curiosity and the bonds of sociability to guide inquiry. Much of *Experience and Education*, published in 1938, is devoted to refuting this conclusion, principally by showing that teacher passivity, far from being logically entailed by his original view, is a non sequitur. "Since freedom resides in the operations of intelligent observation and judgment by which a purpose is developed," Dewey wrote,

guidance given by the teacher to the exercise of the pupils' intelligence is an aid to freedom, not a restriction upon it. . . . [T]he suggestion upon which pupils act must in any case come from somewhere. It is

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194. DEWEY, *THE SCHOOL AND SOCIETY*, *supra* note 134, at 10.

195. *Id.* It is sometimes argued that the deep aim of Dewey's pedagogic reform was the creation of a potentially revolutionary counterculture that would ultimately reverse the deleterious effects of the Industrial Revolution on American democracy. From the point of view of this marxisant reading of Dewey, the relation of student to teacher is almost self-evidently less important than the relation of the students as producers to one another and to the tools and materials of production. See, e.g., David K. Cohen, *Dewey's Problem*, 98 *ELEM. SCHOOL J.* 427 (1998).

impossible to understand why a suggestion from one who has a larger experience and a wider horizon should not be at least as valid as a suggestion arising from some more or less accidental source.<sup>196</sup>

At times Dewey went so far as to contemplate the possibility of what we might, adopting a term from District 2's debates, call the teacher-centric, progressive school. For instance, he argued that it followed from the failure of traditional, lock-step educational planning only that the "planning must be flexible enough to permit free play for individuality or experience and yet firm enough to give direction towards continuous development of power."<sup>197</sup> Beyond this glimpse of the possibility of formalizing the teacher's attention to students' learning strategies, however, his abiding conception of the community of learners never carried him.

Tolstoy wrote a half-century before Dewey, and on the basis of his experience running a school for peasants on his estate at Yasno-Polyana. As a Slavophil, Tolstoy believed that only through the intellectual and economic emancipation of the peasants could Russia regain its due and distinctive place in the community of cultivated nations. Of the aptitude and natural curiosity of the uneducated he, like Dewey, had no doubt. But he knew from first hand observation that daily experience did not push the peasant youths towards school learning. Nor did the prospect of knowledge of the great books of Russian and world literature attract them to it. So, like the architects of the Balanced Literacy program, he went to great lengths to find texts that engaged his pupils' natural interests without overtaxing their ability to master the alien skill of reading.<sup>198</sup> This attention to "graded" texts anticipates the Guided Reading emphasis in Balanced Literacy.<sup>199</sup> Moreover, in surveying the "advanced" literacy programs in use in Western European countries, Tolstoy quickly realized that there was no single, scientifically validated method for teaching reading. What he found instead was a clutch of partial, even contradictory techniques (many, it turns out, close analogues to familiar positions in today's "phonics"/"whole language" battles). From this profusion of methods Tolstoy drew conclusions regarding the role of the teacher that directly anticipate the approach of programs like Balanced Literacy:

Every individual must, in order to acquire the art of reading in the shortest possible time, be taught quite apart from any other . . . . One pupil has a good memory, and it is easier for him to memorize the syllables than to comprehend the vowellessness of the consonants; another reflects calmly and will comprehend a most rational sound method; another has a fine instinct, and he grasps the law of word

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196. DEWEY, *EXPERIENCE AND EDUCATION*, *supra* note 134, at 71.

197. *Id.* at 58.

198. LEO TOLSTOY, *TOLSTOY ON EDUCATION* 269-79 (Leo Wiener trans., 1967) (discussing "graded reading").

199. See *supra* notes 146-47, 174-77 and accompanying text.

combinations by reading whole words at a time.

The best teacher will be he who has at his tongue's end the explanation of what it is that is bothering the pupil. These explanations give the teacher the knowledge of the greatest possible number of methods, the ability of inventing new methods, and, above all, not a blind adherence to one method . . . .

. . . Every teacher must know that every method invented is only a step, on which he must stand in order to go farther . . . .<sup>200</sup>

Although Tolstoy anticipated the fluid formalization of method characteristic of the innovations in District 2, he had nothing to say about the problem that arises when the setting changes from the one-room rural school to the urban school district and the method must be institutionized on a large scale. That problem is the central concern of the current of school reform to which we turn next. By focusing on the practical aspects of linking analogous systems of governance at the school, district and state levels, this literature escapes the limits of the top-down and bottom-up movements for reform while foreshadowing the way school districts around the country are actually synthesizing innovative features of both.

### C. *Synthesis: The New Accountability*

The literature on innovations in school governance is called, bluntly enough, "The New Accountability." Prompted in part by Congress' 1994 reauthorization of the Elementary and Secondary Education Act of 1965, states came during the 1990s to reconsider the way they held their districts and schools accountable for performance.<sup>201</sup> As they contemplated reforms in their accountability systems, they began willy-nilly to reconcile the pressure for school reform emanating from the national "minimum standards" debate with the pressure for new instructional practices emanating from the Sizer-Meier professional revolt.<sup>202</sup> The literature that reflects and stylizes these early attempts at synthesis is at once a rough sketch of comprehensive reform of the sub-national levels of the school system and a crude map of a possible path from the old to the new. Although incomplete, it is proving to be prescient.

The New Accountability shifts emphasis from regulatory compliance to contextualized judgments about the capacity of school systems to produce ever

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200. TOLSTOY, *supra* note 198, at 58.

201. See *infra* notes 202-13 and accompanying text.

202. See, e.g., Susan H. Fuhrman, *The New Accountability*, CPRE POL'Y BRIEFS (Consortium for Pol'y Research in Educ., RB-27, Jan. 1999); DIANE MASSELL, STATE STRATEGIES FOR BUILDING CAPACITY IN EDUCATION: PROGRESS AND CONTINUING CHALLENGES (Consortium for Pol'y Research in Educ., RR-41 (1998)); Massell et al., *supra* note 124; New American Schools, Standard of Quality for Design-Based Assistance (Nov. 1999) (draft manuscript, on file with NYU Review of Law & Social Change); The Prichard Committee for Academic Excellence, *supra* note 99.

better educational outcomes. Accreditation is made less dependent on achieving mandated pupil-teacher ratios and the like and more on evaluation of student performance.<sup>203</sup> School districts are evaluated less on their capacity to implement state directives than on their ability to foster schools that in turn produce good educational outcomes.<sup>204</sup> Whereas under the standard regime, the fate of the school or district depends on meeting a fixed standard, the emphasis now is on "continuous improvement strategies involving school-level planning around specific performance targets" that measure rates of improvement against locally defined goals.<sup>205</sup> Judgments about accreditation are no longer limited to pass or fail. Rather, schools and districts earn ratings that vary along a continuum.<sup>206</sup> At the level of the school or the classroom, paper reviews and visits from the central office are giving way to "lengthy peer visits that . . . involve feedback and extensive discussions about practice."<sup>207</sup> Test scores and other indicators of educational performance, such as attendance and dropout rates, are typically reported by school and district, and there are more and more consequences, formal and informal, attached to the levels of performance thus revealed.<sup>208</sup>

Realizing these principles requires extensive institutional reform. The investment required to enable schools and districts to fulfill their new responsibilities is called "capacity building." Commentators identify four interlocking strategies for building capacity.<sup>209</sup> First, educators in a number of states have created a public-private infrastructure for professional development and technical assistance that is at least partly independent of the state department of education.<sup>210</sup> Second, some states are changing the standards for professional development and the requirements for certifying and licensing teachers to require more and novel kinds of professional preparation.<sup>211</sup> Third, states are developing curriculum frameworks that describe generally and illustrate with precise examples how the new standards can be applied in the classroom.<sup>212</sup> Fourth, states that have associated themselves with the New Accountability typically require some periodic school improvement planning, "and several states view[] school improvement planning as a way of linking bottom-up decision-making with the top-down goals of standards-based reform."<sup>213</sup>

The New Accountability abstracts from and to an extent idealizes the experiences of states that are leading this educational reform movement. In the

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203. See Fuhrman, *supra* note 202, at 1.

204. See *id.*

205. *Id.* at 1, 2.

206. See *id.*

207. *Id.* at 2.

208. See *id.* at 1, 2.

209. MASSELL, *supra* note 202, at iv-vi.

210. See *id.* at iv.

211. See *id.* at v.

212. See *id.*

213. *Id.* at v-vi.

next Part, we look at the experience of two of these leaders, Texas and Kentucky, to show how the general mechanisms just described work in practice and to gauge, however crudely, the gap between idealization and reality.

### III.

#### TWO CASE STUDIES OF THE NEW ACCOUNTABILITY IN PRACTICE: TEXAS AND KENTUCKY

Given the complexity of the changes in course, progress towards educational reform is inevitably uneven. We present two cases to suggest how problems that look intractable in one setting are overcome in another, and how questions open for all admit of different solutions.<sup>214</sup> We focus on Texas and

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214. There is, for example, the question of the proper directiveness of the framework provided by standards. If the framework is too intrusive, it suffocates local innovation. If it is merely indicative, local action is uncoordinated, and parents, teachers and students are left guessing about what they need to do to please the authorities. See DAVID K. COHEN & DEBORAH LOEWENBERG BALL, *INSTRUCTION, CAPACITY, AND IMPROVEMENT* 15–16 (Consortium for Pol’y Research in Educ., Research Report Series, RR-43, June 1999).

Our choice of Texas and Kentucky should not be understood to denigrate similar strides made elsewhere. Consider, for example, two recent reports of the North Carolina State Board of Education and Department of Public Instruction. Both reports evaluate events in North Carolina schools and districts in the wake of the state’s adoption of an accountability system similar to Texas’s. Under that system, the state rates schools by comparing the pace of improvement in their pupils’ scores on periodic tests to the pace of improvement at other schools with similar socioeconomic profiles, then uses the ratings to trigger rewards or state-assisted, peer-guided improvement planning. See *Setting Annual Growth Standards: “The Formula”*, Public Schools of North Carolina Accountability Brief, Jan. 2002, at <http://www.ncpublicschools.org/vol2/settingannuagrowthstandards.html>. State-level monitoring and evaluation, see North Carolina’s Assistance to Low-Performing and At-Risk Schools (June 2001), available at [http://www.ncpublicschools.org/school\\_improvement/nc\\_assistance.pdf](http://www.ncpublicschools.org/school_improvement/nc_assistance.pdf), has linked surprising gains in student test scores in certain poor and minority schools and districts to those institutions’ adoption of New Accountability techniques very like those used in Texas and Kentucky (discussed below) and in New York City’s District 2 (discussed above). See Public Schools of North Carolina, *Evaluation Brief: Defining Proficiency as High-Quality Work*, June 2000, at 1–4, available at <http://www.ncpublicschools.org/Accountability/evaluation/evalbriefs/vol2n5-quality.pdf> (providing a “diverse” “collection of . . . exemplars” of methods used by rapidly improving schools and districts, which are premised on “discussing goals, defining criteria for judging work, and agreeing on standards of excellence” and which rely on multiple iterations of goal-setting and planning by small teams of teachers, implementation of plans and the evaluation of results to generate improved outcomes for students and classrooms); Public Schools of North Carolina, *Evaluation Brief: Improving Student Performance: The Role of District-Level Staff*, March 2000, at 1–5, available at <http://www.ncpublicschools.org/Accountability/evaluation/evalbriefs/vol2n4-role.htm> (identifying “districts where clusters of schools” had “minority students . . . performing at a high level [or making] large gains over several years, or where the black-white achievement gap had been reduced” and other “districts where both white and black students have made the highest gains in the state, regardless of percent of poor and minority students in the district” and comparing conditions there to those observed in “low performing schools by the State’s Assistance Teams and the School Improvement Division”; concluding that the difference between the two sets of institutions is a set of “strategies” and “practices” “for direction and support of schools [emanating] from the district level,” including: sustained “present[ation of] compelling reasons why change is needed”; a “coherent vision of school improvement”; evaluation and monitoring by “[c]entral office staff . . . , including superintendents, . . . [who are] in the schools each week”;

Kentucky because, among the states leading in school reform, these are two in which courts played active—but interestingly different—roles. In both cases, we entwine the account of the operation of the new reform mechanisms with the story of the emergence of new coalitions and institutional arrangements that made the move from the old system to the new politically feasible. In the sections that follow, we then reflect more systematically on innovations in the role of the courts and in forms of collective action that arose in Texas and Kentucky and help explain what in the light of standard theories appear to be improbable, even impossible, outcomes.

### A. Texas

The standard legal account of the history of school reform in Texas is preoccupied with concerns about the equitable distribution of public monies for education.<sup>215</sup> From this point of view, the fact that some reformers and members of the Texas Supreme Court gave weight to adequacy considerations in legal proceedings seems at best a successful technical ploy, at worst a self-limiting distraction from the main issues of the reform movement.<sup>216</sup> As ploy, the advantage of the adequacy argument was simply to allow the court to approve additional redistribution through educational programs that could not have been achieved had poor plaintiffs simply demanded the straightforward redistribution

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“high expectations”; “a sense [on the part of district personnel as well as principals, teachers and parents] of personal accountability for their students and a belief that *everyone* has a part to play [and that n]o one is ‘off the hook’”; “eliminat[ion of] fragmented approaches to school improvement” and use of “[d]istrict goals and plans [to] provide a framework for school improvement plans, which in turn are carried to the department and the classroom level”; and assumption that such “plans are ‘living documents’ . . . and are continuously refined”; “alignment” of the “‘written, taught, and tested’ curricula” based on the state’s own North Carolina Standard Course of Study (NCSCS); “[f]requent and diagnostic use of assessment data (state and local assessments) . . . [u]sing item banks [and] district-level diagnostic tests” while also encouraging “teachers to develop their own diagnostic classroom assessments [that] . . . are not limited to multiple choice tests” and rely as well on “portfolios of student work”; “[d]isaggregation of data across various subgroups and levels of achievement”; “focused and sustained professional development consistent with the district’s overall vision of learning, the NCSCS, and the type of instructional strategies desired”; and, most generally, the districts’ vision of themselves as a “technical assistance team” that is continuously “present in the schools” to “problem-solve with schools,” “identify research and resources,” “help schools use time creatively to allow for collaborative planning among teachers,” and “observe in classrooms and give formative (not performance appraisal) feedback to principals.”). For studies concluding that the North Carolina accountability system has had a combination of “many positive” effects (“consistent with state goals”) and some unfortunate effects on the behavior of school principals, see Helen Ladd, *School-Based Educational Accountability sSystems: The Promise and the Pitfalls*, 54 NAT’L TAX J. 385, 398 (2001); Helen Ladd & Arnaldo Zelli, *School-Based Accountability in North Carolina: The Responses of School Principals*, 38 EDUC. ADMIN. Q. 494 (2002).

215. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607 (1999). For discussions of the early stages of the Texas reform, see William P. Hobby, Jr. & Billy D. Walker, *Legislative Reform of the Texas Public School Finance System, 1973–1991*, 28 HARV. J. ON LEGIS. 379 (1991); Levine, *supra* note 6.

216. See Farr & Trachtenberg, *supra* note 215, at 670.

of resources in their favor. As self-limiting distraction, adequacy arguments blinded the courts and some reformers themselves to remaining inequalities of endowments and in so doing obstructed further reform through the grandiloquent overvaluation of half-measures.<sup>217</sup>

The account of the reform we give here is different in two crucial regards. First, it is less centered on legal actors; in important respects, it is not centered on them at all. Although they remain an indispensable part of the story, it is more as facilitators of relations among others than as protagonists. Second, our account sees adequacy arguments not as a makeweight or mistake, but rather as a doctrinal innovation that clears the way for institutionalizing these new forms of collaboration between protagonists in civil society under the authority of the courts.

### 1. History

Texas came late to the progressive school centralization that dominated school administration during most of the twentieth century, and like many late converts, was particularly zealous in applying its new orthodoxy: The Texas Education Agency (“TEA”) created a thicket of rules almost without regard to the performance of pupils or schools.<sup>218</sup> By the 1980s, the gap between the modern economy’s demands for an educated workforce and the state education system’s inability to produce one was alarming enough to prompt formation of a reform coalition of business leaders and citizens’ groups. The reform coalition, chaired by H. Ross Perot, a pioneer in the computer-services industry, first wanted to use the central bureaucracy of the TEA to impose high-stakes minimum performance standards and to discipline day-to-day school operations in an effort to achieve them.<sup>219</sup> The high stakes included a controversial “no pass, no play” rule forbidding students who failed school exams to take part in high school football or other extracurricular activities. The operating discipline took the form of enthusiastic efforts to enforce previously ignored directives and

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217. *See id.*

218. *See* Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 495 (Tex. 1992); Farr & Trachtenberg, *supra* note 215, at 613 (discussing reforms of the late 1940s). Much of the history of Texas school reform in this section was obtained from Julissa Reynoso & Tiffany Wong, Education Reform: A Case Study of Texas (March 27, 2000) (unpublished manuscript, on file with NYU Review of Law & Social Change) and from interviews conducted by the authors of that paper, Columbia Law School student researchers Julissa Reynoso and Tiffany Wong. Notes of these interviews are on file with NYU Review of Law & Social Change. *See* Interview by Julissa Reynoso & Tiffany Wong with David Anderson, Chief Counsel, Texas Education Agency, Austin, Tex. (Apr. 17, 2000) [hereinafter Anderson interview]; Interview by Julissa Reynoso & Tiffany Wong with Lionel “Skip” Meno, former Tex. Commissioner of Education, Austin, Tex. (Apr. 17, 2000) [hereinafter Meno interview]; Interview by Julissa Reynoso & Tiffany Wong with William R. Ratliff, then Chairman, Finance Committee, Texas State Senate, Austin, Tex. (Apr. 10, 2000) [hereinafter Ratliff interview].

219. *See* Hobby & Walker, *supra* note 215, at 387–88; Farr & Trachtenberg, *supra* note 215, at 628–29.



adopt new ones relating to everything from light bulbs to distribution of teachers' instruction manuals. A small army of state educational inspectors was loosed upon the districts and schools to check compliance with the old and new regulations.

These changes produced counter-movements at both the local and state levels. At the local level, school officials realized that they would be subject to heightened scrutiny. But they also realized that the data on poor student performance and school conditions gathered by the Perot Commission and its administrative heirs could be used to shift responsibility from themselves to the state for underfunding schools. The upshot was the *Edgewood* lawsuit, which a group of poor school districts and civil rights plaintiffs filed in the same year that "no pass, no play" became the rule.<sup>220</sup>

At the state level, the effort at improvement by directive quickly proved self-defeating. There was next to no chance that a central office could reconstruct a school system as vast, faulty and impoverished as Texas's. As these limits became manifest, the central reformers looked for ways to impose accountability without controlling day-to-day operations. Their instrument was an elaborate testing program. The subsequent reform of the education system in Texas is the story of how accountability came to focus on the now-familiar division of labor between local initiative and central elaboration of standards, which in part provoked, and in part was the result of, a shift in the emphasis of the *Edgewood* lawsuit from equity to adequacy.

Events in 1989 advanced this transformation and illustrate the interactions that produced it. The Texas Supreme Court declared the state's public school finance system in violation of the state constitution. It ordered that state funding of public schools cease six months later unless the legislature conformed the system to constitutional requirements.<sup>221</sup> This decision came soon after Texas's Lieutenant Governor (commonly said to have more power than the state governor) created a quasi-public consortium, directed by a Houston lawyer and Dallas investment banker, to inquire into school finance and accountability.<sup>222</sup> The state education administration created a parallel committee to propose accountability reforms.<sup>223</sup>

The two study groups came to contrary conclusions. Following in the footsteps of the Perot Commission, the public-private consortium advocated fixed performance standards and corresponding tests geared to levels of competence achieved in the world's best educational systems. The administrative committee, in contrast, preferred diagnostic tests and other measures designed

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220. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) ("*Edgewood I*"); Farr & Trachtenberg, *supra* note 215, at 631.

221. See *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 493-94 (Tex. 1991) ("*Edgewood II*") (describing history of case).

222. See Reynoso & Wong, *supra* note 218, at 1-2; Ratliff interview, *supra* note 218.

223. See Reynoso & Wong, *supra* note 218, at 2-3.

more to reveal institutional problems and indicate progress in solving them than to change the incentive structures of the key actors.<sup>224</sup>

“Skip” Meno, appointed Texas Commissioner of Education in 1991, reconciled the two views of standards by linking the dispute to the new division of responsibilities between the central administration and districts and schools.<sup>225</sup> Meno’s formative experience was the reorganization of a school for unruly youths, where the key to success had been to involve the pupils themselves in designing the reforms.<sup>226</sup> The institutional extension of this experience was the conviction that school reform would be effective only if local districts and schools were given substantial responsibility for self-improvement. The key organizing principle, which flatly repudiated the centralizing tendencies that had prevailed in Texas and elsewhere throughout the 1980s, was that “the state shall determine what the students will be taught, and the local districts and teachers should determine how they are going to be taught.”<sup>227</sup> To maximize the local incentives for change without threatening the central administration’s capacity to respond to distress, thresholds had to be sufficiently rigorous and diagnostic to give informed urgency to district and school reforms, but not so difficult that the number of substandard performers would overwhelm the system.<sup>228</sup>

While Meno was forging this compromise, the state legislature was evading reform of school finance, either by superficially manipulating the current flow of funds to appear to satisfy constitutional niceties or by shifting responsibility for raising additional monies to local entities.<sup>229</sup> Having none of it, the state supreme court (joined in the later stages by the state electorate) rejected the legislature’s efforts because of their “overall failure to restructure the system.”<sup>230</sup> By 1993, the Texas Supreme Court was threatening to shut down the

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224. For the difference between performance and diagnostic standards, *see supra* notes 124–28 and accompanying text.

225. Meno interview, *supra* note 218.

226. *See id.*

227. *Id.*

228. *See id.*

229. *See Farr & Trachtenberg, supra* note 215, at 646–51.

230. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 496 (Tex. 1991). As described in a later Texas Supreme Court decision:

The Legislature responded [to the Texas Supreme Court’s 1989 order requiring a new funding scheme] by passing Senate Bill 1 in June 1990. The school districts renewed their challenges in the district court, which held that the school finance system remained unconstitutional. On direct appeal, we also held that the system remained inefficient, noting the “overall failure to restructure the system.” *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 496 (Tex. 1991) (*Edgewood II*). We therefore directed the district court to reinstate its original injunction, but again postponed the effective date to give the Legislature time to respond. *Id.* at 498–99.

The Legislature then passed Senate Bill 351, which created 188 county education districts (CEDs) to carry out taxing functions. Numerous school districts and individuals challenged the constitutionality of the new finance structures. This Court sustained two of those challenges, holding that Senate Bill 351 levied a state ad valorem tax in violation of article VIII, section 1-e of the Texas Constitution, and that it levied

school system or take it over. The legislators were close to "panic."<sup>231</sup> Their way out was Senate Bill 7.<sup>232</sup>

The legislation (whose particulars we describe in a moment) was inspired by and extended the compromise that Meno achieved between the public-private research consortium and the TEA's administrative reform committee.<sup>233</sup> It unblocked the logjam by allowing the legislature to increase funding substantially but on the condition that districts and schools be held accountable for their performance. Put another way, the bill established a relation between the legislature and the school system like the one between the central school administration and the individual districts and schools. In both cases, accountability was key. As the bill's sponsor, Senator William Ratliff, put it in an interview, the "major selling point for [the finance reform was that,] 'We're not just going to give them more money, we're going to hold them accountable for it.'"<sup>234</sup>

The bill also unblocked a second logjam, between the legislature and the judiciary. As long as the lawsuit and the court remained focused on finance equity, the legislature kept trying to guess the smallest redistribution that the court would find acceptable, and the court had to guess whether the legislature's guess would in fact improve the conditions of the schools.<sup>235</sup> Not surprisingly, the result of this testy game was the legislature's successive efforts at appeasement and the courts' repeated rejection of them. For a time the contest between the two branches of government seemed as inevitable as it was futile: Until reforms were well under way it would be impossible to say what level of redistribution—or, indeed, if money by itself—would lead to significant improvement in education. But in order to defer definitive resolution of the funding question, the court would have to inaugurate reform with a provisional, open-textured finding of the sort that much judicial experience with desegregation had discredited. Thus, the trial judge repeatedly rejected gestures in the direction of an open-ended decree that the state provide children with an adequate education.<sup>236</sup>

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an ad valorem tax without an election in violation of article VII, section 3 of the Texas Constitution. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 524 (Tex. 1992) (*Edgewood III*). Once again, we directed the district court to reissue its injunction, as modified to give the Legislature time to act. *Id.* at 523 & n. 42, 524.

The Legislature's first response to *Edgewood III* was to propose a constitutional amendment that would have authorized the creation of CEDS with limited authority to levy, collect, and distribute ad valorem taxes. See Tex. S.J.Res. 7, 73rd Leg., R.S., 1993 Tex.Gen. Laws 5560. . . . [T]he voters rejected that measure[.]

*Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726–27 (Tex. 1995) ("*Edgewood IV*").

231. See Meno interview, *supra* note 218; Ratliff interview, *supra* note 218.

232. Act of May 28, 1993, ch. 347, 1993 TEXAS GEN. LAWS 1479.

233. See Meno interview, *supra* note 218; Ratliff interview, *supra* note 218.

234. Ratliff interview, *supra* note 218.

235. See Meno interview, *supra* note 218; Ratliff interview, *supra* note 218.

236. See *Edgewood Indep. Sch. Dist. v. Meno*, No 362514A (Travis County Dist. Ct., 250th J.D. Dist. of Tex., Aug 7, 1991), *rev'd. sub nom.* *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); Farr & Trachtenberg, *supra* note 215, at

The judge pronounced himself incompetent to establish a substantive definition of constitutionally acceptable education and in any case unwilling to assume the impossible burden of perpetually monitoring the schools' achievement of such of a standard.<sup>237</sup> Prior to 1993, therefore, judicial advocacy of an adequacy-based approach to resolving the lawsuit was confined to a single opinion by then-Justice (now United States Senator) John Cornyn concurring in part in and dissenting in part from the Texas Supreme Court's rejection of the legislature's second of three successive proposals.<sup>238</sup>

Senate Bill 7 ("SB 7") enabled the court to adopt an adequacy standard by establishing a monitoring relation between itself and the legislature like the one the bill established between the legislature and the school system.<sup>239</sup> Just as the legislature would be able to monitor schools' progress in achieving reform through a combination of outcome and diagnostic standards, so the court would be able to determine whether the legislature was making acceptable use of its discretion under the open-ended adequacy decree by observing the lawmakers' response to progress on these same standards. With these new mechanisms for setting standards and monitoring compliance in place, Justice Cornyn was able in his opinion for the Texas Supreme Court in its fourth major decision in the litigation ("*Edgewood IV*") to command majority support for an opinion affirming the legislation.

In *Edgewood IV*, Cornyn moved from equity to adequacy arguments, redefining both, in three steps. First, he rehearsed the familiar practical and theoretical objections to a requirement of equity strictly construed. As a practical matter, it is impossible (and the court itself previously had declined) to prevent rich districts from supplementing expenditures on their schools beyond whatever levels are determined to be fair for all districts. Wealthy districts thus would be allowed to regain some of the advantage that equalization was supposed to deny

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689–90 ("[The trial judge] reserved his harshest criticism for some of the [school] districts that . . . argued that equity was not necessary as long as the state provided a minimum adequate education. . . . [The judge] allowed some testimony regarding 'adequacy' issues related to this debate, but emphasized that he would not get involved in defining an adequate education.").

237. See Farr & Trachtenberg, *supra* note 215, at 690 n.465 (quoting the trial judge in unpublished remarks saying, "I don't want to sit here and listen for weeks and weeks and weeks to experts from all over the country. I don't know how to figure adequacy anyway.").

238. See *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 525–27 (Tex. 1992) (Cornyn, J., concurring in part and dissenting in part) ("An 'efficient' education [as required by the Texas Constitution] requires more than elimination of gross disparities in funding; it requires the inculcation of an essential level of learning by which each child in Texas is enabled to live a full and productive life in an increasingly complex world. . . . [The court's prior opinions] require . . . the legislature to articulate the requirements of an efficient school system in terms of educational results, not just in terms of funding.").

239. See *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 730 (Tex. 1995) (concluding that "the accountability regime set forth in Chapter 35 [of SB 7] . . . meets the legislature's constitutional obligation to provide for a general diffusion of knowledge statewide"). The court expressly allowed the broadest possible delegation of authority for the actual administration of the new accountability regime, including to entities not affiliated with the State Board of Education or, indeed, any state agency. See *id.* at 730 n.8.

them.<sup>240</sup> Theoretically, equity at all levels could also be undercut by a legislature malignly determined to level down spending. In a pointed warning to advocates of a simple equality-based approach, Cornyn noted that if the court followed their lead, “[i]t would be constitutional for the Legislature to limit all districts to a funding level of \$500 per student as long as there was equal access to this \$500 per student, even if \$3500 per student were required for [the] general diffusion of knowledge [required by the state Constitution].”<sup>241</sup>

Second, Cornyn endorsed the legislature’s equation of “the provision of a ‘general diffusion of knowledge’ [as required by the Texas Constitution] with the provision of an accredited education” and the achievement of accreditation with the “accountability regime set forth in Chapter 35” of SB 7:

In this Chapter, the Legislature defines the contours of its constitutional duty to provide a “general diffusion of knowledge” by articulating seven public education goals. These goals emphasize academic achievement. Most notably, the Legislature envisions that all students will have access to a high quality education and that the achievement gap between property-rich and property-poor districts will be closed. The Legislature has established a system of student assessment and school district accreditation to measure each district’s progress toward meeting these goals . . . . Districts that chronically fail to maintain accreditation standards are subject to penalties, including dissolution of the offending school district and its annexation to another district.<sup>242</sup>

The seven goals to which the court referred establish benchmarks for school performance, equality of access, effective management, and accountability. For example, “Goal B” is that “[t]he achievement gap between educationally disadvantaged students and other populations will be closed. Through enhanced dropout prevention efforts, the graduation rate will be raised to 95 percent of students who enter the seventh grade.”<sup>243</sup>

In step three, Cornyn argued that, with the passage of SB 7, redistribution of school funding had proceeded far enough to allow school districts (1) to undertake initial reforms, although not necessarily (2) to take all the steps necessary to meet their periodically adjusted constitutional obligations as defined by the act’s accountability regime. In the former regard, Cornyn noted that whereas before the passage of SB 7, the richest school districts had 700 times more taxable property wealth per student than the poorest ones, after its passage, the ratio was reduced to 28-to-1. More particularly, he pointed to Commissioner Meno’s testimony at trial suggesting that “a general diffusion of knowledge” requires about \$3500 per weighted student. Under the act’s various refunding

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240. *See id.* at 731.

241. *Id.* at 729–30.

242. *Id.* at 728–29 (citing TEX. EDUC. CODE §§ 35.021–121, .041, .062, .121).

243. *Id.* at 728 n.7 (quoting TEX. EDUC. CODE § 35.001).

mechanisms, an amount slightly in excess of this would be generally available. "Thus, the district court found that every district can provide an accredited education with funding provided" by these mechanisms.<sup>244</sup>

The court's construction plainly invited reexamination of funding mechanisms in the light of information revealed by the new accountability system. As Cornyn emphasized in the second paragraph of his lengthy opinion, "[o]ur judgment in this case should not be interpreted as a signal that the school finance crisis in Texas has ended."<sup>245</sup> Cornyn later underscored the provisionality of the court's finding that SB 7 satisfied the constitutional requirement of a general diffusion of knowledge: "Obviously, future legal challenges may be brought if a general diffusion of knowledge can no longer be provided within the equalized system because of changed legal or factual circumstances."<sup>246</sup>

The principal dissent attacked the majority decision as a retreat from the court's commitment to equity in school finance. It reiterated the logic of the prior *Edgewood* holdings that the school system was not constitutionally "efficient" because it "failed to provide rich and poor districts with substantially-similar access to revenues."<sup>247</sup> Dissenting Justice Spector dismissed Cornyn's equation of the state's obligation to provide for the "general diffusion of knowledge" with the provision of an accredited education as defined in SB 7 as an apology for the existing regime, with all its limitations.<sup>248</sup> Justice Spector noted with incredulity that for the new standard to be more than a pretext for the sacrifice of constitutional responsibility, the court would have to continually reevaluate the constitutionality of the state's accreditation standard.<sup>249</sup>

Spector's dissent rightly focused attention on the details of the accountability scheme. In order to be more than an elaborate justification for inaction, the accreditation system had to demonstrate the need for improvement, especially in the provision of education to poor and minority students; suggest how this improvement could be achieved; and demonstrate to the public and thus to the court that conditions were in fact improving at an acceptable rate. A closer look at the scheme established by SB 7 suggests that these were precisely its goals.

## 2. Operation

The Texas Public School Accountability System that resulted from the

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244. *Id.* at 730 n.10.

245. *Id.* at 725.

246. *Id.* at 731 n.10.

247. *Id.* at 766 (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) (Spector, J., dissenting)).

248. *See id.* at 768.

249. *Id.* at 768 (quoting *id.* at 732 n.14 (majority opinion)). Justice Spector cited Commissioner Meno's testimony in the lower court "in regard to Senate Bill 7, that 'our present accreditation criteria at the acceptable level . . . does [sic] not match up with [i.e., falls below] what the real world requirements are.'" *Id.* at 768.

process described above is outlined in Chapter 39 of the Education Code.<sup>250</sup> The system uses an intricate division of labor among specialized government entities to generate data on the performance of individual students and ethnic and socio-economic school sub-populations such as Hispanics or students qualified for a federal lunch subsidy on the basis of their parents' low income. These data are then combined into metrics that permit comparison of the performance of demographically similar schools and districts on many dimensions. In turn, those comparisons enable the state to reward good performers and also to attend to poor ones by providing help in formulating and implementing improvement strategies and, *in extremis*, by withdrawing accreditation and putting the district in receivership. In the leading schools and districts these data inform classroom practices and school- and district-based professional development and reorganization, fostering the kind of organized attentiveness to the needs of individual students that emerged as the result of professional self-searching in New York's District 2.

The raw material for assessment of districts and schools is data from two sources. The first is a series of tests of pupil performance known as the Texas Assessment of Academic Skills ("TAAS").<sup>251</sup> Reading and mathematics are assessed at grade levels three to ten inclusive; other subjects such as writing, science, social studies, algebra, biology, and English and U.S. history are assessed on a more limited basis.<sup>252</sup> The second source is a variety of measures of institutional performance, exclusive of individual test scores, including the passing rate on end-of-course examinations, attendance and dropout rates, rates of improvement in scores on reading and mathematics tests compared to peer institutions, and, for districts and high schools, high school completion rates, percent of high school students completing an advanced course, and SAT and ACT examination participation levels and results.<sup>253</sup> Via the Academic Excellence Indicator System ("AEIS"), the Texas Education Agency compiles information about performance on each of these metrics at the school, district and

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250. TEX. EDUC. CODE ANN. § 39.022 (Vernon 1995 & Supp. 2003) (establishing obligation of State Board of Education to create a statewide assessment program to ensure school accountability for student outcomes).

251. The TAAS tests became publicly available in 1995. In the 1998–1999 school year, TAAS was aligned with state-mandated curriculum requirements. See TEX. EDUC. AGENCY, TEXAS STUDENT ASSESSMENT PROGRAM TECHNICAL DIGEST FOR THE ACADEMIC YEAR 2000–2001 ch. 1, available at <http://www.tea.state.tx.us/student.assessment/resources/techdig/index.html> (last modified Dec. 19, 2002) [hereinafter 2000–2001 STUDENT ASSESSMENT PROGRAM TECHNICAL DIGEST]; *infra* notes 288–89 and accompanying text (discussing the recent replacement of TAAS with a more sophisticated and more difficult test that is better aligned with the state's updated curriculum).

252. See Tex. Educ. Agency, 1999 Interim Report 1 (Dec. 1999). For specifics on student assessment and test development, see 2000–2001 Student Assessment Program Technical Digest, *supra* note 251.

253. For a full list of categories included in annual report cards for schools and districts, see Tex. Educ. Code Ann. § 39.051–052 (Vernon 1995 & Supp. 2003). See also Tex. Educ. Agency, 2000 Accountability Manual § 3 (April 2000), at <http://www.tea.state.tx.us/perfreport/account/2000/manual/> [hereinafter 2000 Accountability Manual].

statewide level and reports these results to the public through the TEA's website and publications.<sup>254</sup>

These same data are further used to create performance ratings for each school and district. The Accountability Rating System ("ARS") uses a subset of information on the AEIS—principally, TAAS performance in reading, mathematics, and writing, as well as dropout and attendance rates—to rank individual districts and schools as "exemplary," "recognized," "academically acceptable" and "academically unacceptable."<sup>255</sup> In 1999, a campus was "exemplary" if at least 90% of students in *each reported sub-population* passed the TAAS in each subject area, the dropout rate was 1% or less, and the attendance rate was at least 94%.<sup>256</sup>

Schools' rates of improvement in reading and mathematics are further ranked by comparison to the improvement rates of the forty other schools in the entire state of Texas that are most like themselves. The comparison group is defined by the ethnic composition and social and economic status of their respective student bodies. Campuses that otherwise would be ranked in the category of "academically unacceptable" count as "acceptable" if, despite their low absolute performance, their scores are improving at least at a minimum requisite rate.<sup>257</sup>

Districts and schools that rank high on these ratings are rewarded. Under the Texas Successful Schools Award System, schools in the top quartile of their forty-school comparison group based on their ARS scores and/or rates of improvement in reading and mathematics receive an award of \$500 to \$5000, depending on the number of students in the school. The state distributed \$5 million in the 1997–1998 and 1998–1999 school years.<sup>258</sup>

Districts and schools with low ratings face special scrutiny by state accreditation teams, school improvement obligations and possible sanctions. Low ARS ranking and poor performance on specified AEIS indicators trigger an accreditation review by a team consisting of one or more TEA staff members

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254. See, e.g., Tex. Bus. and Educ. Coalition, *Evaluating the Performance of Texas Public Schools, A Guide to the Academic Excellence Indicator System Reports (2001–2002)*, available at <http://pipe.triand.com/Marketing/AEIS.html> (last visited Nov. 22, 2003).

255. For the precise designated rankings, see 2000 Accountability Manual, *supra* note 253, at § 3.

256. See Tex. Educ. Agency, 1999 Accountability Manual § 7, available at <http://www.tea.state.tx.us/perfreport/account/99/manual/> (last visited Nov. 22, 2003); Fuhrman, *supra* note 202, at 27. For a comparison of the Texas and Kentucky testing systems, see David K. Cohen & Deborah Loewenberg Ball, *Instruction, Capacity and Improvement 15* (Consortium for Pol'y Research in Educ., Research Report Series, RR-43, June 1999).

257. See Tex. Educ. Code Ann. § 39.051(c) (Vernon 1995 & Supp. 2003); 2000 ACCOUNTABILITY MANUAL, *supra* note 253, § 3.

258. See TEX. EDUC. CODE ANN. §§ 39.091–.096 (Vernon 1995 & Supp. 2003); TEX. EDUC. AGENCY, TEXAS SUCCESSFUL SCHOOLS AWARD SYSTEM: 1999–2000 METHODOLOGY, at <http://www.tea.state.tx.us/tssas/9900method.html> (last visited Nov. 22, 2003); TEX. EDUC. AGENCY, TEXAS SUCCESSFUL SCHOOLS AWARD SYSTEM: 1999–2000 FREQUENTLY ASKED QUESTIONS, at <http://www.tea.state.tx.us/tssas/9900faq.html> (last visited Nov. 22, 2003).



and graduates of the Texas School Improvement Initiative ("TSII"). TSII is a professional development program that brings public and private school teachers, counselors, specialists in bilingual, gifted and other similar programs, professional association staff members, principals, central office personnel, and superintendents from different areas together to exchange best practices, including best practices in evaluation. Characteristically, TSII advertises itself in a way that combines professional development and training in peer assessment.<sup>259</sup> Graduates of the program therefore are typically professionals who have broad knowledge of effective use of assessment tools in classroom activity, school organization and institutional restructuring. Accreditation reviews conducted by teams composed largely of TSII graduates therefore amount to—and indeed are explicitly conceived as—"peer evaluations."<sup>260</sup>

The products of the investigation are a report and immediate feedback to the school or district concerning the findings of the on-site evaluation team and its recommendations for achieving better outcomes. These in effect correct, up or down, the ranking scores and allow for a customized response by the central authority to local problems and achievements. Rankings are supplemented by on-site investigations of many different types that may raise or lower the performance rating assigned to a school or district according to the findings of the on-site evaluation team.<sup>261</sup>

Districts whose performance, thus corrected, is rated academically unacceptable, low-performing, or otherwise noncompliant with state and federal requirements are subject to complex, multi-year state interventions and sanctions.<sup>262</sup> Many of these, including hearings conducted by the board of trustees or the commissioner, the preparation of student achievement improvement plans, and the assignment of management intervention teams, oblige the district to scrutinize itself carefully and make deliberate plans for improvement.<sup>263</sup> Goals set in this way become additional, more customized performance standards against which the district is subsequently judged. Note also, that while the AEIS and ARS focus on schools and districts as the unit of accountability, the

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259. On the Texas Education Agency's website, <http://www.tea.state.tx.us/tsii/> (last visited Nov. 22, 2003), TSII is defined as four things: (1) "A statewide educational leadership network." (2) "A cadre of school district representatives trained in effective school practices." (3) "Practitioners with expertise in analyzing student outcomes, planning, decision making and program evaluation." (4) "Practitioners who participate in on-site peer review evaluations."

260. 2000 ACCOUNTABILITY MANUAL, *supra* note 253, at 1 ("Annually, more than one thousand of these local professionals attend summer academies to be trained as peer review team members.").

261. *See* TEX. EDUC. CODE ANN. § 39.074 (Vernon 1995 & Supp. 2003). For discussion of the many different types of on-site evaluations, see TEX. EDUC. AGENCY, ACCOUNTABILITY PROCEDURES MANUAL FOR ON-SITE EVALUATIONS 1999–2000, at <http://www.tea.state.tx.us/account.eval/apm9900v3.doc> (last visited Nov. 22, 2003) [hereinafter ACCOUNTABILITY PROCEDURES MANUAL].

262. *See* ACCOUNTABILITY PROCEDURES MANUAL, *supra* note 261, at 74–80.

263. TEX. EDUC. CODE ANN. § 39.131 (Vernon 1995 & Supp. 2003).

accountability system has also been extended to assess the efficacy of capacity-building mechanisms such as teacher professional development and teacher training and certification courses.<sup>264</sup>

The emergence of the accountability system has gone hand in hand with the development of public-private partnerships that help districts and schools meet their performance obligations—and help the public see whether they are doing so—while pressing the state to refine both its standards and assessment tools. They do this by reassembling the TEA's own data in formats carefully keyed to the needs of the public and educators; characterizing and presenting for public scrutiny the practices of successful schools and districts; and proposing curricular reforms growing from their own investigations. Two such intermediary institutions are Just for the Kids and the Charles A. Dana Center, both affiliated with the University of Texas at Austin. Organizational-chart formalities aside, both are key elements of the accountability system, and likely to become more important in time.

Just for the Kids (which more recently has spun off the National Center for Educational Accountability) was founded by Tom Luce, a Dallas lawyer who served as the staff director to the Perot Commission and continued to work for adoption of minimum standards.<sup>265</sup> Once TASS results were being reported, Just for the Kids began to re-aggregate the data to show parents at a click the “‘opportunity gap’—the gap between its current level of performance and the average level of performance of the highest-performing schools with similar student populations in the state.”<sup>266</sup> Recently it has begun to identify consistently improving schools and districts and to articulate, together with the educators responsible for the results, the best practices that produce the successes.<sup>267</sup>

The Dana Center grew largely out of the work of Uri Treisman, a mathematician. While working toward his doctorate at the University of California at Berkeley in the 1970s, Treisman became fascinated by the differences in the study habits of Asian-American and African-American students of calculus at the university. The Asian-Americans, who did well in the classes, formed study groups that continuously reviewed the teachers' expectations and the strengths and weaknesses of the problem-solving strategies of each group

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264. See TEX. EDUC. AGENCY, PDAS MANUAL AND FORMS, at <http://www.tea.state.tx.us/PDAS> (last visited Nov. 22, 2003). For discussion of the Texas Education Agency's Professional Development and Appraisal System (PDAS) and Accountability System for Educator Preparation (ASEP), see Reynoso & Wong, *supra* note 219, at 10–12. For discussion of the linkage of professional development to the assessment program, see TEX. STATE BD. FOR EDUCATOR CERTIFICATION, ABOUT SBEC: THE AGENCY AND ITS WORK, at [www.sbec.state.tx.us/SBECOnline/about/agencywork.asp](http://www.sbec.state.tx.us/SBECOnline/about/agencywork.asp) (last visited Nov. 22, 2003).

265. See NAT'L CTR. FOR EDUC. ACCOUNTABILITY, ABOUT US: BOARD OF DIRECTORS, at [http://www.measuretolearn.org/index.cfm?pg=about\\_us&subp=bod](http://www.measuretolearn.org/index.cfm?pg=about_us&subp=bod) (last visited Nov. 22, 2003).

266. See JUST FOR THE KIDS, TEXAS SCHOOL DATA, at [http://www.just4kids.org/TX/TX\\_schooldata.asp](http://www.just4kids.org/TX/TX_schooldata.asp) (last visited Nov. 22, 2003).

267. See JUST FOR THE KIDS, U.S. BEST PRACTICES, at [http://www.just4kids.org/US/US\\_bestpractices.asp](http://www.just4kids.org/US/US_bestpractices.asp) (last visited Nov. 22, 2003).

member. The African-American students did none of these things, and did poorly, even though many had been high school valedictorians and were plainly motivated to succeed. Acting on this observation, Treisman transformed the remedial program into which the African-Americans with difficulties were being shunted into a successful honors program based on collaborative work on challenging, conceptually-framed problems—an institutionalized variant of the Asian-American study groups.<sup>268</sup> Treisman's focus on collaborative attention to the learning strategies of individual students converged with, and influenced, the work on Balanced Literacy that is described above.<sup>269</sup> Through the activities of the Dana Center, Treisman's work also shaped the Texas mathematics curriculum.

Once Texas's accountability system was in place, the Dana Center complemented its work on new curricula with professional development programs designed to help teachers master the collaborative practices the new curricula demand and organizational development programs that help districts build the capacity needed to make pervasive professional development part of everyday school operation. In particular, the Center's Education Improvement Network ("EIN") facilitates detailed exchanges among ten leading districts in the state. Separately and together, these districts work to implement new classroom practices, new forms of school- and district-based professional development, and new career paths in which growing expertise in, for instance, peer review, is a precondition for greater administrative responsibility as well as teach-the-teacher positions with no managerial responsibilities.<sup>270</sup>

The efforts to ascertain and publicize best practices by both Just for the Kids and the Dana Center converge on two general findings. The first is the emergence of the district as a key actor in reform. This might seem obvious. Restructuring schools need services they cannot provide themselves; neither the state nor private firms can meet much of the demand; the district has resources, and is accountable for school performance; so the district becomes a key supplier of services—the infrastructure of reform—to its component schools. Nevertheless, a decade ago the district was widely, and probably correctly, regarded as yet another bureaucratic hindrance in the education system, draining resources from the schools while promulgating rules restricting teachers' ability to use their talents in the classroom. The fact that, for both Just for the Kids and the Dana Center, the district has become a key interlocutor and is seen by both as

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268. See Phillip Michael (Uri) Treisman, *A Study of the Mathematics Performance of Black Students at the University of California, Berkeley* (1985) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with authors).

269. See *supra* notes 145–47, 174–77 and accompanying text.

270. See Univ. of Tex. at Austin, Education Improvement Network website, at <http://www.utdanacenter.org/ein/>. The authors are currently collaborating with EIN on a research project designed to determine whether effective implementation of classroom- and district-level reform strategies is linked to improved student outcomes.

central to school reform suggests the kind of deep, broad organizational shift that could make reform truly “systemic.”<sup>271</sup>

The second finding is that schools and districts are fusing top-down and bottom-up reforms, granting autonomy in return for accountability in the way that we have repeatedly encountered. Each district apparently has its own method of doing this, borrowing techniques wherever they can be found. At all events both the Dana Center and Just for the Kids are intent upon providing tools that connect the actors at different levels to each other. The resulting structure, as reflected in their lists of best practices, might be called (New York City) District 2 without the professional-cultural angst, or simply Tolstoy in Texas.<sup>272</sup> Here, for example, is Just for the Kids’ set of best practices for all levels of the Texas system below the TEA:

#### DISTRICT PRACTICES

- Define Clear and Specific Academic Objectives in the District’s Written Curriculum
- Provide Leaders, Resources and Support to Achieve Academic Objectives
- Monitor School Performance
- Reward, Intervene or Adjust Based on School Performance

#### SCHOOL PRACTICES

- Prepare a School Plan to Ensure All Students Achieve Academic Objectives
- Align Programs, Resources and Personnel to Achieve Academic Goals
- Ensure the Use of Data-Driven, Research-Based Instructional Practices and Arrangements
- Monitor Student and Teacher Performance
- Reward, Intervene or Adjust Based on Teacher Performance

#### CLASSROOM PRACTICES

- Collaborate in Effective Grade/Subject-Level Teams

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271. AMY H. HIGHTOWER, *SAN DIEGO’S BIG BOOM: DISTRICT BUREAUCRACY SUPPORTS CULTURE OF LEARNING I* (Ctr. for the Study of Teaching and Pol’y, Research Report R-02-2, 2002) (“[T]he existing literature on school districts now stands divided into two divergent characterizations—districts as bureaucratic and districts as learning-centric—with the research community largely viewing these two portrayals as distinct.”). For additional evidence, in this case from North Carolina, of the key role districts can play in systemic reform, see *supra* note 214.

272. See *supra* notes 173–83, 198–200 and accompanying text.

- Teach to Specified Academic Objectives Using Best Instructional Practices and Arrangements
- Monitor the Progress of Every Student
- Intervene or Adjust Instruction Based on Individual Student Performance

School-level accounts confirm that the classroom practices being meshed with accountability systems are indeed the ones the earlier discussion would lead us to expect. Teaching methods at the Margo Elementary School in the Weslaco District, for example, are immediately familiar from the earlier discussion of Balanced Literacy and District 2. One thousand three hundred and fifty-one of the school's nearly 2000 overwhelmingly Hispanic students are from families poor enough to qualify for federal lunch subsidies. But 97% passed and 80% were proficient on the 2001 fourth grade reading test—in math, 99% passed and 71% were proficient. The principal attributes much of the success to “our individual reading program. We ensure that every child in kindergarten through second grade reads with a teacher, one-on-one, every day.” Daily progress is carefully monitored, and where there are problems, “I have to find resources quickly,” a first-grade teacher says.<sup>273</sup>

A recent study by the EIN project of rapidly-improving high-poverty school districts in Texas tells a convergent story. The EIN researchers identified seven, and investigated four, large (at least 5000 students) and robustly improving districts that met demanding selection criteria.<sup>274</sup> At least one-third of each district's high-poverty schools (where 50% or more of the students qualify for free or reduced-price lunches) had to be rated “recognized” or “exemplary” in the state accountability system, including at least two middle or high schools; rates of exclusion from the TAAS test for limited English proficiency students, dropout and absence rates, and ninth grade retention rates all had to be below the state averages; and, crucially, district scores on demanding academic tests such as the SAT and Advanced Placement exams had to show significant gains. The four districts chosen for study “represent[ed] the greatest diversity (geographic, district size, and racial/ethnic composition) possible.”<sup>275</sup> In the poorest district, 87% of the students were low income, and 3% were white. In the next poorest, 71% were low income and 14% were white. Because only 15% of all Texas schools were rated as “exemplary” in 1997–1998, and an additional twenty-five rated as “recognized,” the districts in the study thus managed to get at least a

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273. See S. C. Gwynne, *How Good Is Your Kid's School?*, TEX. MONTHLY, Nov. 2002, at 123; see *supra* notes 145–47, 173–76, 180 and accompanying text.

274. See LINDA SKRLA ET AL., UNIV. OF TEX. AT AUSTIN, EQUITY-DRIVEN ACHIEVEMENT-FOCUSED SCHOOL DISTRICTS: A REPORT ON SYSTEM SCHOOL SUCCESS IN FOUR TEXAS SCHOOL DISTRICTS SERVING DIVERSE STUDENT POPULATIONS (2000).

275. *Id.* at 3.

third of their high-poverty schools to outperform 60% of the schools statewide.<sup>276</sup>

The EIN report attributes the districts' success to causal clusters that reflect the key aspects of the reform architecture under discussion here: changes in the accountability system; local use of information disclosed by the accountability system to pressure districts into improving; the emergence of new reform leaders; the transformation, as a result of all this, of district organization; and, ultimately, changes in educators' understanding of equity and excellence.<sup>277</sup>

These outcomes cannot be attributed simply to the introduction of new testing regimes alone. Many states have introduced high-stakes tests but have not reported gains like those in Texas.<sup>278</sup> Whatever their exact explanation, however, the best available research from Texas and elsewhere suggests that these favorable outcomes are the result at least in part of a combination of educational reforms, including increased spending on schooling, particularly for poor areas, large investments in teacher training, and holding schools explicitly accountable for the achievement of children in each minority group with corresponding attention to questions of equity.<sup>279</sup>

It is too soon for a comprehensive evaluation of the student outcomes in Texas, as long lead times are required before changes become manifest and stable. Above all, we have no direct test of the effect of the new classroom practices that uses the methods Wenglinsky applied to the NAEP results. Early indications are, however, that test scores are moving in the right direction,<sup>280</sup>

276. See *id.* at 2–3.

277. *Id.* at 6–7.

278. See, e.g., Monty Neill & K. Gayler, *Do High School Graduation Tests Improve Learning Outcomes? in RAISING STANDARDS OR RAISING BARRIERS?*, *supra* note 17, at 107.

279. See DAVID W. GRISSMER ET AL., IMPROVING STUDENT ACHIEVEMENT: WHAT NAEP STATE TEST SCORES TELL US 58–73 & n.4 (2000) (discussed *infra* note 284); Gary Orfield & Elizabeth DeBray, Education for the Poor: Lessons from New Research on the U.S. Program to Aid Concentrated Poverty Schools 23 (May 2000) (unpublished manuscript, on file with NYU Review of Law & Social Change); sources cited *supra* note 214 (reporting results of a study of high-performing North Carolina districts and schools with substantial minority populations and linking success to district and classroom practices very like those discovered in the EIN study of rapidly improving Texas districts and also to that state's sophisticated accountability scheme); *supra* notes 275–79 and accompanying text. See also Tammi J. Chun & Margaret E. Goertz, *Title I and State Educational Policy: High Standards for All Students*, in *HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM* 120–29 (Gary Orfield & Elizabeth H. DeBray eds., 1999) [hereinafter *HARD WORK*].

280. See GRISSMER ET AL., *supra* note 279, at 58–73; Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES, No. 8 §§ 3.4, 3.5 (2000), at <http://epaa.asu.edu/epaa/v8n41/index.html> (last visited Nov. 22, 2003) (noting “considerable publicity for the apparent success of reform in [Texas]” based on test score data); Jonathan Fox, *Old-Style Tests May Hamper School Reform, Experts Say*, EDUC. DAILY, Apr. 14, 1999 at 2 (noting that advocates of “criterion-referenced” tests claim that the tests, along with accountability, “helped produce the highest score gains of this decade on the National Assessment of Educational Progress (NAEP), catapulting [Texas] from lower-than-average NAEP standards to near the national average”). Cf. Orfield & Debray, *supra* note 279 (Texas had the largest increase on fourth grade mathematics scores between 1992 and 1996 of the thirty-five states participating in the NAEP, although prog-

although controversy surrounds their interpretation.<sup>281</sup>

This much, however, can be said with confidence. Texas students in all grades have made substantial gains on the TAAS.<sup>282</sup> They also have made gains on the NAEP, an independent and highly regarded measure of student performance.<sup>283</sup> Indeed, Texas, along with North Carolina, made the largest gains on

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ress in reading has been roughly average for the country and has not accelerated since 1992); *supra* notes 188–92 and accompanying text (discussing Wenglinsky study).

For an up-to-the-minute report on educational outcomes in Texas and elsewhere from the standpoint of a national comparison of states, see *Quality Counts 2003: "If I Can't Learn From You,"* EDUC. WEEK, Jan. 9, 2003, at <http://www.edweek.org/sreports/> (last visited Nov. 22, 2003).

281. See, e.g., Haney, *supra* note 280, at § 4.0 ("The problem with TAAS and the way it is being used in Texas may be summarized under five sub-headings: 1) the TAAS is having a continuing adverse impact on Black and Hispanic students; 2) the use of the TAAS test in isolation to control award of high school diplomas is contrary to professional standards concerning test use; 3) the passing score on TAAS is arbitrary and discriminatory; 4) a variety of evidence casts doubt on the validity of TAAS scores; and 5) more appropriate use of test results would have more validity and less adverse impact."); Eric A. Hanushek, *Deconstructing RAND*, EDUC. MATTERS, Spring 2001, at 65, available at <http://www.educationnext.org/2001sp/65.html> (criticizing main study touting Texas gains for relying on insufficiently detailed family backgrounds of Texas students who took the NAEP and doubting conclusions that smaller class size and higher teacher salaries connected with Texas reforms contributed to increases in NAEP test scores); McNeil & Valenzuela, *supra* note 19, at 15 ("In conclusion, the TAAS is a ticket to nowhere. It is harmful to instruction by its rigid format, its artificial treatment, its embodiment of discredited learning theories, its ignoring of children's cultures and languages, and its emphasis on the accounting of prescribed learning. The test itself, and the system of testing and test preparation, have in poor and minority schools come to usurp instructional resources and supplant the opportunity for high quality, meaningful learning."). Cf. Stephen P. Klein et al., *What Do Test Scores in Texas Tell Us?*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 49 (Oct. 26, 2000), at <http://epaa.asu.edu/epaa/v8n49> ("[W]e found that the reading and math skills of Texas students improved since the full implementation of the TAAS program in 1994. However, the answers to the questions of how much improvement occurred, whether the improvement in reading was comparable to what it was in math, and whether Texas reduced the gap in scores among racial and ethnic groups depend on whether you believe the NAEP or TAAS results. They tell very different stories."). But cf. MARTIN CARNOY ET AL., DO HIGHER TEST SCORES IN TEXAS MAKE FOR BETTER HIGH SCHOOL OUTCOMES? (Consortium for Pol'y Research in Educ., Research Report Series, RR-047, 2001) (reporting study results indicating that TAAS has not produced the perverse effects typically associated with high-stakes testing: increased rates of exclusion of vulnerable populations from the test-taking pool, increased retention rates and dropout rates, and a focus on the test to the detriment of other learning opportunities).

282. See, e.g., CARNOY ET AL., *supra* note 281, at 6–8; TEXAS' RESPONSE TO THE 1999 SUMMIT ACTION PLAN 2–4 (Mar. 24, 2000), available at <http://frodo.mindseye.com/achieve/achievestart.nsf/4f501eb8b49a0782852568be003a5439/b920d64be42b626c852568bd005506e0/SF/ILE/Texas.PDF>.

283. GRISSMER ET AL., *supra* note 279, at 55–63 (discussed *infra* note 284); EVALUATING THE PERFORMANCE OF TEXAS PUBLIC SCHOOLS, *supra* note 254, at 1 ("The academic achievement of Texas students as measured by the TAAS exam have been confirmed by their high scores on the National Assessment of Educational Progress ("NAEP") . . . . In the scores released on September 28, 1999, Texas eighth grade students' results were at or near the top of the nation on the 1998 writing tests. Overall, Texas students' scale score of 154 ranked fourth behind Connecticut (165), Maine (155) and Massachusetts (155). The national average was 148. The results by individual student group look even better for Texas. The scores of African-American students led the nation. Hispanic student scores ranked number two behind Virginia, Asian student scores number two behind Maryland, and white student scores number two behind Connecticut."); *supra* note 214

the NAEP of all states from 1990 to 1997.<sup>284</sup> It is true, as critics of the Texas system have asserted, that high school graduation rates are relatively low in Texas: about 65% of African American and Latino eighth graders graduate four years later, whereas 78% of their white classmates receive high school diplomas. It is also true that high proportions of African American and Latino students are retained at grade at some point during their high school careers.<sup>285</sup> But it is not true that the introduction of TAAS accounts for these last-mentioned outcomes. On the contrary, the rising retention rates date to the implementation of the earlier Texas educational reforms beginning in 1984, and the evidence does not support claims that statewide dropout rates increased after the adoption of SB 7.<sup>286</sup> If anything, the relationship between TAAS and dropout rates is the reverse: High schools with the largest increases in the pass rates on the tenth grade TAAS had the largest declines in dropout rates. And this relation is most pronounced in urban high schools attended by low-income students.<sup>287</sup>

In any case, the Texans themselves seem committed to extending the state's educational standards and the assessment regime associated with it in ways that emphasize just those capacities for critical conceptual thinking that, in the eyes of critics, the TAAS-based system slights. The key innovation here is the introduction, already well under way, of the Texas Essential Knowledge and Skills curriculum ("TEKS") and its companion assessment tool the Texas Assessment of Knowledge and Skills ("TAKS").<sup>288</sup> Both have been developed with massive collaboration from teachers statewide and with the help of the Dana Center. The TEKS explicitly marks a shift away from algorithmic or rule-based pedagogy to a focus on concepts. Under TAAS, students learning to distinguish area from perimeter might have been taught that area is "about multiplication" and perimeter is "about addition." Under TEKS, students learn that area is about coverage and is measured by multiplying the length of the sides of the area covered, and perimeter is about framing and is measured by addition of the length of the sides of a frame. This shift requires teachers to

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(discussing North Carolina's reformed accountability system); *supra* note 191 and accompanying text (discussing the NAEP test).

284. See GRISSMER ET AL., *supra* note 279, at 59 & n.4 (concluding that "Texas and North Carolina [were] the states showing the highest rate of improvement" and linking those improvements to "systemic reform policies implemented in both states in the late 1980s and early 1990s" that "originated in the business community" and "generat[ed] the agenda for reform and its passage in the legislature").

285. See CARNOY ET AL., *supra* note 281, at 23; Orfield & DeBray, *supra* note 279, at 32. See also Darling-Hammond, *supra* note 124, at 19–20 (noting that Texas's dropout and retention rates remain very high, especially for African-American and Latino students).

286. See CARNOY ET AL. *supra* note 281, at 14–23 (producing data that systematically refutes any linkage between the TAAS program and Texas retention and dropout rates).

287. See *id.* at 23.

288. On TEKS, see TEX. EDUC. AGENCY, TEX. ESSENTIAL KNOWLEDGE AND SKILLS (TEKS), at <http://www.tea.state.tx.us/teks/> (last visited Nov. 22, 2003). On TAKS, see TEX. EDUC. AGENCY, TAKS IMPLEMENTATION, at <http://www.tea.state.tx.us/student.assessment/taks/> (last visited Nov. 22, 2003).



design individual class lessons and grade-by-grade class sequences that communicate and deepen understanding of the relevant concepts rather than simply "covering" a list of required substantive themes. Preparation for the statewide transition to the TEKS, which is to be completed by the 2003–2004 school year, has become a focal point for discussion and pooling of "better" curricular and assessment practices, especially among rapidly improving districts such as those associated with EIN and the Dana Center.<sup>289</sup>

An optimistic reading is thus that the Texas public school system is on the verge of a substantial improvement in performance. Better showings on TAAS, especially by members of minority groups, may be starting to decrease retention rates and increase graduation rates, and these gains may eventually result in increased propensity and ability to pursue higher education. All this may be reinforced and accelerated by the shift to TEKS. But if retention and attrition rates remain high, if (despite first indications to the contrary) rates of college attendance do not increase even in the best performing districts, or if there is no statewide correlation between increasing tenth-grade TAAS scores and the participation rates and scores of high-school students taking national college entrance exams such as the SAT<sup>290</sup>—if there is none of this, the Texas system and the general accountability regime of which it is a leading example will have failed by their own standards, and ours.

## B. Kentucky

### 1. History

If the trajectory of reform in Texas was largely top-down and inside-out, emanating from the TEA and allied quasi-governmental institutions, the trajectory in Kentucky was more nearly the reverse: grassroots and almost anti-institutional.<sup>291</sup> Reform began in a statewide citizens committee that excluded

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289. See *supra* notes 268–72 and accompanying text. For criticisms of the earlier TAAS test that the TEKS and TAKS are designed to avoid, see *supra* note 281.

290. See CARNOY ET AL., *supra* note 281, at 23.

291. Much of the description of events that follows is taken from a comprehensive and insightful article by Molly A. Hunter, see Hunter, *supra* note 101. Hunter is Director of Legal Research at the Campaign for Fiscal Equity in New York. See also Jacob E. Adams, Jr., *School Finance Reform and Systemic School Change: Reconstituting Kentucky's Public Schools*, 18 J. EDUC. FIN. 318 (1993); Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES (Helen F. Ladd et al. eds., 1999); Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367 (1991); Ronald G. Dove, Jr., *Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform*, 17 J. EDUC. FIN. 83 (1991); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–95*, 26 L. & SOC. INQUIRY 631 (2001); C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599 (1995); Jonathan Shafer & Alexander Greenawalt, *Education Reform in Kentucky* (April 13, 2000) (unpublished manuscript, on file with NYU Review of Law and Social Change).

the educational bureaucracy and other entrenched educational interests and in offshoots from that committee in the cities and towns and other parts of Kentucky's civil society.<sup>292</sup> Within a few years participants at both levels came to support a legal challenge to the state's school system.<sup>293</sup> The state supreme court found in their favor, declaring the state's entire school system unconstitutional in a decision that began with adequacy arguments much like those that eventually ended the institutional logjam in Texas.<sup>294</sup> The Kentucky legislature followed the high court's lead. Looking at national experience as well as the court's decision, the legislature enacted a comprehensive reform of the state's educational system, emphasizing both augmented local initiative and statewide accountability.<sup>295</sup>

In doing so, however, the state legislature came to exercise such active oversight on educational reform that it began in effect to co-manage the reorganization of the state's school system, emarginating the educational bureaucracy without, however, providing public schools with the support services that the new reforms require. Thus, having succeeded in its revolt against the entrenched educational interests, and having rallied the courts and political classes, civil society in Kentucky has so far failed either to construct a new administrative center at the service of decentralized reform, as in District 2, or to leave a void in which new actors outside the government could provide such services on their own, as in Texas. Nonetheless, there are some first encouraging signs that the Kentucky system does afford opportunities for both official actors and new entrants to correct existing blockages.

The stirrings of Kentucky's civil society date to the early 1980s, when political, civic, and business communities acknowledged the catastrophic economic and social costs of a school system that ranked nationally near the bottom on all significant criteria.<sup>296</sup> The state Council of Higher Education appointed a blue-ribbon commission in 1980 to study the problem of educational quality in Kentucky and formulate recommendations to the governor.<sup>297</sup> The commission quickly concluded that serious reform was needed but highly unlikely given the

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292. See Hunter, *supra* note 101, at 489–94.

293. *Id.* at 494–95.

294. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 213 (Ky. 1989) (“The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education. . . . An adequate education is one which has as its goal the development of the seven capacities recited previously.”); see *supra* notes 222–49 and accompanying text (discussing the evolution of Texas judicial reforms from an exclusive focus on funding to an emphasis on educational adequacy).

295. See Kentucky Education Reform Act, ch. 476, 1990 Ky. Acts 1208 (codified as amended at KY. REV. STAT. ANN. §§ 156–163 and scattered sections (Michie 1999)).

296. See Hunter, *supra* note 101, at 486–87, 488–89.

297. Shafter & Greenawalt, *supra* note 291, at 2–3 (discussing the authors' interview with Robert F. Sexton, Executive Director of The Prichard Committee, April 13, 2000). See THE PRICHARD COMMITTEE, *THE PATH TO A LARGER LIFE: CREATING KENTUCKY'S EDUCATIONAL FUTURE* xiii (2d ed. 1990).

state's deadlocked political system. Frustrated commission members decided to force the hand of the governor and state legislature by reconstituting the commission in 1983 as a not-for-profit, independent, volunteer citizens' advocacy organization to publicize the need for school improvements and build public support for school reform legislation.<sup>298</sup>

This "Prichard Committee" was an assembly of outsiders to Kentucky education. Its membership included a carefully balanced mixture of concerned citizens ranging from former governors to business leaders and involved parents.<sup>299</sup> Active state officials and educators were not invited to participate, evidently to prevent capture by insiders.<sup>300</sup> Funding for the committee's work came from private donations, including a substantial sum from Ashland Oil, the third largest employer in the state, which, like many leading firms in Kentucky, was convinced that education reform was a precondition to attracting and retaining high quality employees.<sup>301</sup>

In November 1984, the Prichard Committee—with the help of local PTAs, chambers of commerce, chapters of the League of Women Voters and similar organizations—organized a statewide meeting. Nearly 20,000 participants in "town forums" at 178 school districts observed a brief introductory broadcast by satellite on the state's educational television channel, then proceeded to discuss their own situation.<sup>302</sup> The upshot was that fifty sites formed organizations to urge reform of their home school districts.<sup>303</sup> The parent body continued to support these county Prichard Committees, as they were often called, hiring a consulting firm to assist the local committees in designing and conducting six regional workshops on themes such as running meetings and organizing support for school reform.<sup>304</sup> Both the statewide and local committees disseminated data

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298. See Shafter & Greenawalt, *supra* note 291, at 3 (discussing interview with Sexton). See THE PRICHARD COMMITTEE, *supra* note 297, at xiii.

299. See THE PRICHARD COMMITTEE, *supra* note 297, at viii.

300. See Hunter, *supra* note 101, at 489–90.

301. See *id.* at 490–91 ("The business community offered a quid pro quo: if Kentucky policy makers and educators would seriously and substantially reinvent schools and make public education accountable for its results, business would support them and pay the resulting higher taxes."); THE PRICHARD COMMITTEE, *supra* note 297, at xi (listing contributors).

302. Hunter, *supra* note 101, at 492. See Michael Jennings, *Citizens' Group to Hold Forum on Education Via Satellite*, LOUISVILLE COURIER-J., Nov. 3, 1989, at B4.

303. See Hunter, *supra* note 101, at 492.

304. Molly Hunter writes:

The Prichard Committee viewed its role at the forum as listening, not promoting any particular point of view. Local citizens were trained to facilitate participation at the town forum sites. The forum revealed that Kentucky citizens placed a high priority on education and provided an early step toward a grassroots mandate for change. Years later, the Prichard Committee reflected on the forum as having set the pattern and tone—"open citizen dialogue and active citizen involvement"—that characterized its subsequent work.

*Id.* Robert Sexton, Executive Director of the Prichard Committee since its inception in 1983, explained that early on the Committee realized that it would never have the resources to directly influence the Kentucky political process and would have to leverage its position by encouraging

to citizens who distrusted information supplied by the state department of education. Thus was created a new forum for debate in communities where the school board, often the county's largest employer, could be an intimidating presence.<sup>305</sup>

As these local discussions proceeded, subcommittees of the statewide body (now expanded from thirty to sixty members) were studying specialized topics. Their work culminated in the publication in 1985 of *The Path to a Larger Life: Creating Kentucky's Educational Future*,<sup>306</sup> a 150-page report discussing educational goals and curriculum, school governance and assessment, school finance, vocational education, and the teaching profession. Its eighty-two recommendations ranged from comprehensive professional development for teachers to outcome measures of student learning.

The report is an extraordinary document. Drawing explicitly on contemporary management literature,<sup>307</sup> the report saw the central challenge for the reform of schools in Kentucky as "the creation of a flexible institutional climate in which creativity and innovation can flourish."<sup>308</sup> The difficulty, they realized, was the tension between the need for local initiative and a potentially contradictory need for uniformity and accountability at the state level. Their formulation of the problem points the way towards the organizational solution we have been discussing in this Article:

On one hand reformers agree that the key to long-term educational change is in the active and informed engagement of local people with their local schools. The quality of local schools reflects the value local people place on education: a concerned and involved community can have good schools; an apathetic community, where education is not valued will not.

On the other hand, authority at the state level is increasing dramatically. In Kentucky and across the nation a push for reform is coming from governors, state legislators, and state superintendents. As

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local activism. Schafer & Greenawalt, *supra* note 291, at 2-5 & n.9 (discussing interview with Sexton).

305. See Hunter, *supra* note 101, at 494:

One of the keys to the Prichard Committee's success was broad dissemination of information to interested people across the state, with the express purpose of enabling recipients to speak up in their communities. The committee provided information to local participants, who felt they could not rely on the state department of education because it was too politicized. For citizens in school districts where school boards were the largest employers in the county, the committee served as an important source of "courage" to get involved. By offering information, training sessions, and a vision of local citizen groups coming together to solve problems and improve their schools, the committee, along with business, the media, and other groups, stimulated public engagement about education throughout the state.

306. THE PRICHARD COMMITTEE, *supra* note 297.

307. See *id.* at 41, 47 n.1 (citing ROSABETH MOSS KANTER, *THE CHANGE MASTERS* (1983)).

308. *Id.* at 41.

the public demands "accountability" and as state leadership responds, the authority of the state increases. This leadership at the state level is essential, but where does it lead? Will it ultimately weaken or strengthen the interest of local people in the quality of their own schools?

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We believe that the state has a clear responsibility to establish expectations and goals. It also has a clear responsibility to protect the public, to ensure quality and to initiate reforms which cannot, or will not, be completed at the local level. But we also believe that state reforms should be judged by their ultimate effects on local students and schools and school districts. Likewise, all state-level reform should, as its ultimate goal, encourage responsibility and accountability at the district and school levels. To accomplish this, state policies must help local taxpayers, parents, and students make sound judgments about their schools; must encourage local interest in good schools; and must give local school leadership the flexibility to seek state-defined goals through creative and innovative means.<sup>309</sup>

Perhaps more surprising, in a period dominated by *A Nation at Risk* and the corresponding bare-bones, often punitive measurement of minimal acceptable performance,<sup>310</sup> the report insisted that measures of schools should be "designed for use by people who are analyzing and evaluating their local schools,"<sup>311</sup> and suggested that the Prichard Committee might itself assist with the "dissemination of reports from selected districts so that other districts might see how an evaluation document is prepared."<sup>312</sup> The report also urged the State Board of Education and the State Department of Education to include indicators of school performance in their annual reports.<sup>313</sup> A fifteen-page appendix listed measures that registered the achievements of individual students as well as the capacities of a school's organization, including the ability to evaluate itself on many dimensions.<sup>314</sup> The State Board of Education was to take responsibility for establishing measures, then collecting and analyzing data and reporting results to the public.<sup>315</sup> Similarly, professional development (the topic with which *A Path to a Larger Life* begins) was to be used to simultaneously encourage local learning and broader exchanges of experience.<sup>316</sup> In its concluding chapter on

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309. See *id.* at 42–43 (quoting AMERICAN EDUCATIONAL STUDIES ASS'N, PRIDE AND PROMISE: SCHOOLS OF EXCELLENCE FOR ALL THE PEOPLE, quoted in EDUC. WEEK, Oct. 24, 1984).

310. See *supra* notes 108–16 and accompanying text.

311. THE PRICHARD COMMITTEE, *supra* note 297, at 67.

312. *Id.* at 68.

313. See *id.*

314. See *id.* at 119–35.

315. See *id.* at 134.

316. See *id.* at 1–20. Each local school district, the report suggested, should involve teachers,

school finance, the report emphasized that its recommendations for improving Kentucky education could not be implemented without a tax increase.<sup>317</sup>

Also in 1985, sixty-six poor rural school districts incorporated the Council for Better Education to bring a lawsuit seeking increased state financial support for their schools.<sup>318</sup> A former governor and member of the Prichard Committee, Bert Combs, became lead counsel to the new entity pro bono, and in November of that year filed the suit that later became known as *Rose v. Council for Better Education*.<sup>319</sup> The Prichard Committee and the Council collaborated closely in the presentation of the case. Committee staff testified at the 1987 trial, members and staff reviewed the Council's briefs before they were filed, and the Prichard Committee formally filed an amicus curiae brief focused on the need for education and governance reform in addition to the finance reform demanded by the plaintiffs.<sup>320</sup>

By 1988, even the educational insiders had rallied to the new movement. A demonstration by a statewide teacher professional organization, the Kentucky Education Association, insisting on more money for schools, attracted tens of thousands. In that same year, the leading education interest groups in the state joined with representatives of business, churches and advocacy groups to form an Education Coalition to speak with one voice to the public and the state legislature.<sup>321</sup>

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principals, administrative staff, support staff and school board members in developing a comprehensive plan for the "continuous professional growth for its teachers and staffs." *Id.* at 8. To help implement these plans, districts were encouraged to create "professional development centers" or "teacher centers" where teachers could share ideas or develop new curricula. *See id.* at 9, 34. Teacher certification, promotion and evaluation were all to be linked to the proposed system of continuous further education. *See id.* at 1-20. Professional development was deliberately conceptualized as a mechanism for anticipating and avoiding the obvious political obstacles to school reform by reducing the likelihood of what the report called "a divisive and destructive confrontation" between entrenched professionals and a reform-minded public:

We are concerned about the possibility of a divisive and destructive confrontation between the teaching profession and the public. This confrontation has occurred in other states where legislators and teachers have battled over teacher evaluation, merit pay, competency testing, and career ladders. In the most divisive cases, determined elected officials confront equally determined, organized teachers who close their minds to valid improvements. As a result, public attitudes in some states have become more hardened and more negative. The profession of teaching, the children, and the public all suffer from such confrontations.

*Id.* at 10-11.

317. The study allocated blame for insufficient funding of the state school system between local governments that "abdicated their responsibility for financing local schools by their reliance on state funding," and the state government which "provides too low a level of support to public education." *Id.* at 112-13. The report set out a detailed plan to remedy both deficiencies by providing more equal funding to school districts at a level compatible with the proposed reforms. *See id.* at 113-15.

318. *See id.*

319. *See id.*; *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).

320. *See Hunter, supra* note 101, at 494-95.

321. *See id.*

In a sense, the ensuing events—a sweeping state supreme court decision in the *Rose* case declaring the state's entire school system unconstitutional,<sup>322</sup> and the state legislature's passage in record time of the Kentucky Educational Reform Act ("KERA"), the most comprehensive reform of education in the nation<sup>323</sup>—are anti-climactic. Having realigned the interest groups, reshaped public opinion, mobilized local communities and experts from a variety of professions and provided an extensive framework for reform, the Prichard Committee's work set the course for the restructuring of Kentucky's schools. Above all, the fusion of equity and adequacy arguments via accountability that had emerged only at the end of the story in Texas but marked the work of the Prichard Commission from the beginning, put a decisive stamp on the court's decision in *Rose*<sup>324</sup> and then on the reforms codified in KERA.<sup>325</sup>

In *Rose*, the supreme court interpreted the Kentucky Constitution's directive to the state legislature to provide an "efficient" public education<sup>326</sup> to require an "adequate" one. By a chain of logic familiar from Texas, the court associated adequacy with seven general but ambitious student outcomes or "capacities."<sup>327</sup> It then defined the level of funding the legislature was obliged to provide in terms of its definition of adequacy: "The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education. . . . An adequate education is one which has as its goal the development of the seven capacities recited previously."<sup>328</sup>

322. *Rose*, 790 S.W.2d at 186.

323. 1990 Ky. Acts 476 (codified at KY. REV. STAT. ANN. §§ 156.005–156.990 (Michie 1999)); Edward B. Fiske, *Starting Over*, N.Y. TIMES, Apr. 8, 1990, at 34 (KERA is "the most comprehensive school reform package ever enacted by a state legislature.").

324. See Shafter & Greenawalt, *supra* note 291, at 9 (reporting view of Prichard Committee director Sexton that by the time of the *Rose* decision, a statewide consensus existed on the desirability of wholesale reform along the lines proposed by *The Path to a Larger Life*).

325. See *infra* notes 334–51 and accompanying text.

326. KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").

327. *Rose*, 790 S.W.2d at 197, 212. According to the decision, an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

*Id.*

328. *Id.*

The legislature's swift translation of the *Rose* decision into a comprehensive educational reform was a foregone conclusion. Both the statewide and local Prichard Committees had lobbied the legislature for years.<sup>329</sup> Public opinion was broadly sympathetic to the conclusions of *The Path to a Larger Life*, including particularly a tax increase to support school improvement.<sup>330</sup> The court's opinion in *Rose* in any case left little room for temporizing or evasion.

KERA proposed to meet the adequacy standard set out in *Rose* by implementing the changes in governance, professional development, and accountability suggested by the Prichard Committee in *The Path to a Larger Life*. But KERA also reinforced the alliance between outside educational reformers, forward-thinking politicians, and the business community that had coalesced around the Prichard Committee. For instance, in 1991, the CEOs of three major Kentucky employers formed the Partnership for Kentucky Schools, a non-partisan coalition dedicated to promoting public support for implementation of the education reform and to providing technical expertise when necessary to fill gaps left by other institutions.<sup>331</sup> As we will see next, however, through their very assertiveness, reinforced no doubt by their lingering mistrust of public bureaucracies, these new alliances and their flanking institutions stifled and retarded the transformation of existing institutions, particularly the Kentucky Department of Education, into an effective infrastructure for local school initiatives and for periodic revision of the framework standards for the education system as a whole.

## 2. Operation

Whatever the eventual limits of the reform design, the sheer audacity of the Kentucky legislature in adopting KERA is impressive. KERA includes a list of broad educational goals defining generally what graduates should know and be able to do,<sup>332</sup> an assessment process to determine if students achieve these goals, a system for holding schools accountable for student success, a system of school-based management by which parents, teachers and administrators can reshape

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329. "Without exception, stakeholders credited the [Prichard] Committee with being the catalyst for elementary and secondary school reform in the state." JACOB E. ADAMS, JR., THE PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE: CREDIBLE ADVOCACY FOR KENTUCKY SCHOOLS 30 (1993).

330. See Carol Marie Cropper, *Business Group Calls for Higher Taxes*, LOUISVILLE COURIER-J., Dec. 21, 1988; Dick Kaukas, *Bluegrass State Poll; 2 Out of 3 Would Pay Higher State Taxes for Better Schools*, LOUISVILLE COURIER-J., Dec. 4, 1988; THE PRICHARD COMMITTEE, *supra* note 297, at xxiv n.1 (noting that between 1983 and 1989, statewide polls registered a rise from forty-nine percent to sixty-seven percent in public support for a tax increase "to raise money for schools"); *supra* notes 303–305 and accompanying text.

331. See Hunter, *supra* note 101, at 501.

332. KY. REV. STAT. ANN. § 158.6451 (Michie 1999). For example, the Act requires that schools develop their students' ability to "become self-sufficient individuals" and to "apply core concepts and principles from mathematics, the sciences, the arts, the humanities, social studies, and practical living studies to situations they will encounter throughout their lives." *Id.*



schools to meet this responsibility,<sup>333</sup> a vast increase in funding for professional development so educators can make corresponding efforts, a new system for credentialing teachers to certify that they are meeting their responsibilities, early childhood programs and special needs programs to assure that pupils can take maximum advantage of the new educational opportunities, a system for equalizing school funding among districts, and a design for transforming the state's educational agency into a competent provider of technical services rather than a rule-maker.<sup>334</sup>

But neither the system of school-based management, nor the new system of testing and assessment, nor the reconstruction of the State Department of Education functioned as hoped. And as difficulties with each of these endeavors reverberated with problems in the others, the legislature—acting in part through its own Office of Educational Accountability, which was created by KERA<sup>335</sup>—intensified its oversight, periodically changing the framework of the state's education system in ways that obstructed the kind of mutually supportive reforms by actors outside the government that emerged in Texas.

Consider first the local building blocks of KERA, the Site Based Management Councils ("SBMCs"). These councils are composed of the school principal, three teachers elected by their colleagues, and two parents elected by their peers. Within broad guidelines set by the state, the councils can fix policies concerning curriculum, textbooks, teaching practices, staff hiring and assignments (including hiring of the principal when there is a vacancy), discipline, extracurricular programs and the school budget.<sup>336</sup> All SBMC meetings are public. As of October 1997, 1032 of Kentucky's roughly 1300 elementary and secondary schools had established SBMCs, and many of the others (including a number of high-performing schools) were exempt from the requirement.<sup>337</sup>

Studies of participation in and the effectiveness of Kentucky's SBMCs suggest substantial difficulties in making the new institutions work.<sup>338</sup> Initial

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333. KY. REV. STAT. ANN. § 160.345 (Michie 1999).

334. See THOMAS B. CORCORAN & BARBARA S. MATSON, A CASE STUDY OF KENTUCKY'S SSI (PRISM), 1992-1997, 1-13 (1998); Hunter, *supra* note 101, at 499-504. The legislature subsequently augmented this accountability scheme by requiring schools and districts to make and report their progress on closing the gap in test scores between white and African-American children. See *infra* notes 366-67 and accompanying text.

335. See KY. REV. STAT. ANN. § 7.410 (Michie 1999) (establishing the Office of Educational Accountability).

336. See Hunter, *supra* note 101, at 500. See also Bd. of Educ. v. Bushee, 889 S.W.2d 809, 812 (Ky. 1994) ("The essential strategic point of KERA is the decentralization of decision making authority so as to involve all participants in the school system, affording each the opportunity to contribute actively to the educational process. The remaining statutory provisions set out the structural framework by which this decentralization of decision making authority is to occur.").

337. See ROGER PANKRATZ ET AL., THE KENTUCKY INSTITUTE FOR EDUCATION RESEARCH: THE 1996 REVIEW OF RESEARCH ON KERA 5 (1997); Beverly M. Klecker et al., *An In-Depth Analysis of Decisions Made by Kentucky's School Based Decision-Making Councils*, 120 EDUC. 655, 657 (2000).

338. See, e.g., Alison A. Carr, *The Participation Race: Kentucky's Site Based Decision*

turnout rates for parents eligible to vote in the council elections were disastrously low (on the order of 4% in 1992) but increased quickly (to 22% by 1993).<sup>339</sup> Participation by minority parents remained disproportionately low and those minorities who have taken part have reported difficulties in making their voices heard.<sup>340</sup> Lacking the budgetary expertise and general managerial skills to deal with their new responsibilities, the SBMCs typically focused on secondary matters such as questions of discipline or particular and restricted areas of the budget.<sup>341</sup> As the Prichard Committee bluntly put it, “[t]oo many school councils have not recognized their independence or the expectation that they will redesign curriculum and improve teaching to increase student learning.”<sup>342</sup>

There are some signs, however, that the SBMCs may prove capable of improvement. The changes inaugurated by KERA have made decisions at the local level dramatically more transparent, and some SBMCs are finding innovative ways of using the possibilities for exercising influence that result.<sup>343</sup> Public disaggregation of budgets to the school and district level, for example, revealed the incoherent, almost incomprehensible allocation of funds through countless small decisions over the years and how much additional discussion and training will therefore be required on all sides to get the situation in hand.<sup>344</sup> In part the new expertise is being supplied by the Kentucky Department of Education (“KDE”), and in part by entrepreneurial efforts of the school councils themselves, which in some places have joined together to form district-wide “Councils of Councils” to pool information and to press their respective school

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*Teams*, THE SCH. COMMUNITY J., Fall–Winter 1996, at 27; Jane L. David, *School-Based Decision Making: Kentucky's Test of Decentralization*, 76 PHI DELTA KAPPAN 706–12 (1994); Klecker et al., *supra* note 337, at 664–65; ALAN J. DEYOUNG, PARENT PARTICIPATION, SCHOOL ACCOUNTABILITY AND RURAL EDUCATION: THE IMPACT OF KERA ON KENTUCKY SCHOOL FACILITIES POLICY (1998), at [http://www.ruraledu.org/keep\\_learning.cfm?record\\_no=135](http://www.ruraledu.org/keep_learning.cfm?record_no=135); GAINING GROUND, *supra* note 99, at 9.

339. See David, *supra* note 338, at 707.

340. See Carr, *supra* note 338, at 36–38.

341. See David, *supra* note 338, at 707.

342. See GAINING GROUND, *supra* note 99, at 9. See also Klecker et al., *supra* note 337, at 664–65:

*Summary of Findings*

1. Most members of the Councils were relatively inexperienced as Council members. Ninety-seven percent of the parents, 90% of the teachers, and 55% of the principals had three or fewer years of Council experience.

2. Councils in this study made many more decisions in the categories of budget, Council procedures, and personnel consultation than in the nine areas in which KRS 160.345 requires them to have policies.

3. Large differences in the number of decisions and in the number of meetings were indicated by the minutes.

4. The number of curriculum decisions was statistically significantly lower in the elementary schools than in the middle and high schools.

5. The mean number of decisions about discipline was statistically significantly higher for high schools than for elementary schools. . . .

343. See David, *supra* note 338, at 708.

344. *Id.* at 710.

districts on questions of concern.<sup>345</sup> A statewide Association of School Councils was also created to supplement the KDE's training and technical assistance for local councils.<sup>346</sup> In the same vein, a comparison of decisions to close small rural schools for purposes of consolidation before and after the passage of KERA found that post-KERA, a profusion of grass roots initiatives used both the new institutional structures and the information on school performance that they provided to challenge bureaucratic decisions that would have been unassailable under the old regime.<sup>347</sup>

These difficulties might have been compensated for or corrected had the KDE been reorganized to provide substantial support to restructuring schools and districts. But although something of this sort was contemplated in KERA, there is little evidence that the legislative hope was realized. Traditionally, the KDE, like the Texas Education Agency before reform there, had controlled the minutiae of schooling, for example, imposing a rigid daily schedule for elementary schools that determined precisely how students would spend their hours in school.<sup>348</sup> As contemplated by KERA, the KDE was instead supposed to coordinate evaluations of school performance and to help districts and schools improve their standing in the light of this information.<sup>349</sup>

Such at any rate is the legislative mandate. On the evidence available to date, it is unclear whether the reconstituted KDE is in fact providing the new services required of it.<sup>350</sup> Indeed, much of its activity seems directed towards compiling manuals and other instructional aids telling the actors in the KERA school system how to comply with their new responsibilities. Whether these

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345. *Id.*

346. See Kentucky Association of School Councils website, at <http://www.kasc.net/what.html> (last visited Nov. 22, 2003).

347. DEYOUNG, *supra* note 338.

348. See Holly Holland, *KERA: A Tale of One Teacher*, 79 PHI DELTA KAPPAN 265 (1997).

349. Thus, KERA explicitly assigns the KDE responsibility for providing "technical assistance with curriculum design, school administration . . . finance . . . [and] professional development," KY. REV. STAT. ANN. § 156.010(1)(a) (Michie 1999); for conducting "research and planning, which shall include, but shall not be limited to, a statewide research and development effort to identify or develop the best education practices," § 156.010(1)(c); and for implementing a school accountability system. Assistance in these areas is provided through eight regional service centers. As in Texas, this shift from bureaucratic supervision to the disciplined coordination of local initiative broadly conceived went hand in hand with a reduction in the size of the central department's staff and a substantial trimming of the rule books. See KY. REV. STAT. ANN. §§ 156.005–156.990 (Michie 1999); KYNA KOCH & TOM WILLIS, KENTUCKY DEP'T OF EDUC. & KENTUCKY LEGISLATIVE RESEARCH COMM'N, THE KENTUCKY EDUCATION REFORM ACT OF 1990: A REVIEW OF THE FIRST BIENNium iv (1993); Hunter, *supra* note 101, at 500.

350. For relevant evaluations, see HILDA BORKO ET AL., PROFESSIONAL DEVELOPMENT: A KEY TO KENTUCKY'S REFORM EFFORT (Ctr. for the Study of Evaluation, Technical Rep. 512, 1999); CORCORAN & MATSON, *supra* note 334; KENNETH J. HENRY ET AL., A STUDY OF PERCEPTIONS OF THE KENTUCKY DISTINGUISHED EDUCATOR PROGRAM (Ky. Office of Educ. Accountability, 1997); PANKRATZ ET AL., *supra* note 337; BRIAN M. STECHER & SHEILA I. BARRON, QUADRENNIAL MILEPOST: ACCOUNTABILITY TESTING IN KENTUCKY (Ctr. for the Study of Evaluation, Technical Rep. 505, 1999); *Education Reform in Rural Kentucky*, 7 NOTES FROM THE FIELD 1 (2000), available at <http://www.ael.org/rel/policy/note2000.htm>.

rules for exercising initiative amount in fact to a reversion to older authoritative rulemaking or are simply beside the point remains to be seen. Moreover, as a glance at the emergent accountability system shows, there are reasons to think that the legislature's active oversight of the reformed system may be obstructing an effective reconstitution of the KDE in its new facilitative role.

These problems locally and at the center have been compounded by the vicissitudes of Kentucky's accountability system. As originally conceived, the Kentucky Instructional Results Information System ("KIRIS") was distinctive, perhaps unique, in the extent to which it used diagnostic standards connected to portfolio assessments.<sup>351</sup> Under KIRIS, the aggregate results of these elaborate student performance assessments, supplemented by data on attendance and graduation rates, generated a composite School Quality Index for each school. The best performing schools were eligible for monetary rewards. Schools with index scores of less than 100 (the level obtained by students deemed "proficient") had to set improvement targets that would theoretically allow them to close the gap in a fixed time. In addition, schools "in decline" (because less than 5% of the school's student body is improving at the desired rate) or "in crisis" (because of their very low baseline scores) were exposed to yet more thoroughgoing review.

KIRIS was criticized by the General Assembly's Office of Educational Accountability, among others, because authentic tests did not allow the competence of the state's pupils to be conveniently compared to that of students nation- and worldwide. Moreover, the baseline index and improvement goals under KIRIS were reset every two years so that each school would nominally progress at an adequate rate toward (and beyond) the "proficient" score of 100. This disrupted curricula and long-term institutional planning.

In response to these and related problems, the General Assembly decided in 1998 to establish a new accountability system, the Commonwealth Achievement Testing System ("CATS"). Under CATS, performance-based assessment is mixed with multiple choice tests that are easier to administer and allow better comparison of Kentucky students to those elsewhere.<sup>352</sup> The legislature addressed the problem of disrupted expectations by freezing the baseline index for each school at a point derived from its test scores between 1998 and 2000 and obliging each school to improve beyond this level at a constant annual rate that enables it to reach a quality index score of at least 100 by the year 2014.<sup>353</sup> The

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351. See Massell et al., *supra* note 124, at 30–31 (discussing "performance-based" or "authentic" assessments under KIRIS); *supra* note 139 and accompanying text and *supra* notes 132, 166, and 214 and accompanying text (discussing portfolio-based assessment techniques).

352. The move from KIRIS to CATS is discussed in Massell et al., *supra* note 124, at 27. In the education literature, tests scored by reference to performance in relation to others in the same testing pool, rather than in relation to an absolute standard of knowledge, are referred to as "norm-referenced." Tests geared to an absolute standard of knowledge are "criterion referenced."

353. 703 KY. ADMIN. REG. 5:020, 5:060 (2002). See also Strecher & Barron, *supra* note 350, at 6 (CATS "uses milepost testing [testing at prescribed grades, rather than continuous evaluation]

legislature also expanded the oversight mechanism. The legislature's own Office of Educational Accountability continues as a monitor of the revised act. But it is joined by a new permanent entity, the Education Assessment and Accountability Review Subcommittee of the Legislative Research Committee,<sup>354</sup> whose eight members from the General Assembly review implementation of CATS for the state Board of Education.<sup>355</sup>

It might be that with these reforms, the Kentucky legislature has struck the right balance between local initiative, facilitative administrative coordination and political oversight. In that case, active and informed SMBCs, together with teachers and other educational professionals<sup>356</sup> working within the improved assessment system could develop the improved curricula and individual school reform projects. Low performing schools would benefit from consultation with experienced practitioners through the "Distinguished Educators" program<sup>357</sup>—Kentucky's version of Texas's School Improvement Initiative.<sup>358</sup> The result would be just the kind of bottom-up comprehensive reform of the education system within a broadly conceived and democratically certified framework that was anticipated by KERA and before it by the Prichard Committee and the *Rose* decision.<sup>359</sup> In giving priority to reform of assessment instruments, KERA and CATS could be said to be creating just the kind of general background

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to see how schools react to accountability pressures"). Under CATS, the best-performing schools again are rewarded; schools improving at eighty percent or more of their projected rate are essentially left to their own devices; and schools performing less well are exposed to heightened scrutiny, including consultation with participants in the state's Highly Skilled Educators program and/or a comprehensive audit by a team appointed by the State Board of Education and charged with working with the troubled school to identify improvement strategies. See CORCORAN & MATSON, *supra* note 334, at 5; THE PRICHARD COMMITTEE, A PARENT/CITIZEN GUIDE FOR 1999–2000 6 (2000); Massell et al., *supra* note 124, at 6–8.

354. See KENTUCKY GENERAL ASSEMBLY, OFFICE OF EDUCATION ACCOUNTABILITY, 1998 ANNUAL REP. 16–26 (1998).

355. KY. REV. STAT. ANN. §§ 156.029, 156.070, 156.148, 156.156–60 (Michie 1999).

356. In regard to professional development programs, see, for example, BORKO, *supra* note 350; PANKRATZ ET AL., *supra* note 337, at 5 ("Support for professional development has increased from \$1 per student in 1991 to \$23 per student in 1996.").

357. See HENRY ET AL., *supra* note 350 (evaluating Distinguished Educators Program).

358. See *supra* notes 259–61 and accompanying text.

359. KERA prohibited the KDE from developing a statewide curriculum. Instead, individual schools were expected to develop their own curricula based on six goals and seventy-five (later reduced to fifty-seven) "valued outcomes." Schools found these outcome standards too general to provide sufficient guidance, opening the way for development of a curricular framework in each of the core areas by committees of teachers and college professors in 1992–1993. This integrated K–12 framework was published as a two-volume document in 1993. See KY. DEP'T OF EDUC., TRANSFORMATIONS: KENTUCKY'S CURRICULUM FRAMEWORK (1993), available at <http://www.kde.state.ky.us/oapd/curric/Publications/Transformations/trans.html> (last visited Nov. 22, 2003). But this document has not in fact provided much guidance for aligning classroom practice to KIRIS assessments. See CORCORAN & MADSON, *supra* note 334, at 6. In sum, while prohibiting the KDE from repeating old mistakes with rigid rules, KERA failed to build a new state-level administration to facilitate local innovation and the realization of the legislature's general goals and valued outcomes.

conditions that encourage successful institutional innovation without pretending to direct it.

Better still, in amassing expertise and continuously monitoring the behavior of the primary reform actors, the Kentucky legislature might be coming to resemble nothing so much as the ideal activist court, transforming American institutions, schools included, through the dictates of the Constitution in the manner imagined by litigation-minded reformers since *Brown v. Board of Education*. Indeed, by identifying itself so thoroughly with the *Rose* court's goals that it has itself become a court with respect to administering the remedy, the legislature might be in the midst of developing an innovative solution to the classic American Legal Process question: Which branch decides?<sup>360</sup> Instead of forcing a choice between the deliberative advantages of the judiciary and the democratic legitimacy of the legislature, the Kentucky solution suggests a way of combining both in a democratically renewed assembly protected from the everyday play of self-serving interests by virtue of association with the court and constitutional principle.

But a contrary interpretation, at least as plausible, sees these developments as an obstacle to reform, not its culmination. In increasing its oversight capacities in response to each wave of difficulties in implementing its original conception, the legislature might be thwarting itself. It might, in addition, be revealing a hidden weakness in the original Prichard strategy for reform and, beyond that, in the "activist court" strategy of institutional reform. The danger is that the legislature through the Office of Educational Accountability, the Education Assessment and Accountability Review Subcommittee, and the National Technical Advisory Panel on Assessment and Accountability comes to use its augmented oversight authority to *itself* make the kind of inflexible rules that previously doomed the KDE and, on the other hand, that seem to be avoided by the hybrid of court, legislature and administration that we observed in Texas.<sup>361</sup>

From this perspective, the Kentucky reform may bear the marks and suffer the limitations of the early 1980s emphasis, associated with *A Nation at Risk*, on standards as necessary and sufficient incentive mechanisms. In this conception, institutions—classrooms, schools, districts—are more a sideshow than places for elaborating successful solutions to educational problems. What counts are parents, pupils, teachers and school leaders, and the incentives and disincentives for learning that systems of assessment and accountability create for them. The paradox of this second perspective is that standards are of such central importance that defining and redefining them—as in the move from KIRIS to CATS and the increasing legislative oversight associated with it—becomes a politically charged exercise in something akin to old-style rulemaking: an effort by the center to amass all the information and interests relevant to solving a problem

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360. See *supra* notes 39–40 and accompanying text; *infra* notes 410–11 and accompanying text.

361. See SABEL & SIMON, *supra* note 23.

and then, based on this apparently panoptic knowledge, to fix rules for local actors.

In the current fluctuating situation, both interpretations of Kentucky's experience are plausible. But recent developments weigh in favor of this latter, more pessimistic interpretation, while also suggesting that the Kentucky system may offer the means for remedying its own deficiencies. One indication of the internal obstructions in the new institutional machinery is the inability, noted above, of the SMBCs to take advantage of their possibilities to reorganize schools. Another indication of organizational blockage is the halting progress of the "Distinguished Educator" program. This program is intended to take highly skilled teachers, provide them with intensive professional development, then find a use for their expertise in helping turn around troubled schools in their home districts. But a recent survey of 110 teachers who participated in the program between 1994 and 2000 found that a majority of them could not find appropriate jobs in their home districts. Many were frustrated enough to switch districts, leave the public schools, or take teaching jobs in neighboring states.<sup>362</sup> According to alumni of the program, "the trouble often lies with administrators who are unwilling to alter the school culture to make use of teachers' leadership and expertise."<sup>363</sup> The inability of Kentucky districts to make effective use of teachers whom they themselves regard as extraordinary and in whom the state has invested substantial resources strongly suggests a low upper bound on the extent of classroom-level reform in the Kentucky system.

Perhaps the clearest sign of the shortcomings of the current system, but also of its reformability, was the creation in 1999 of the Jefferson County Community Accountability Team to look into the cause of and help correct the persistent achievement gap between white and black, male and female, and rich and poor students in Louisville and its suburbs.<sup>364</sup> Founded with the help of the Prichard

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362. See Julie Blair, *In Kentucky, Master Teachers Find They Can't Go Home Again*, EDUC. WEEK, May 30, 2001, at 19. For a discussion of earlier difficulties encountered by the Distinguished Educator Program, see HENRY ET AL., *supra* note 350, at iv ("Many Distinguished Educators were asked to serve too many schools, creating a situation in which the Distinguished Educators may have had too little time to develop a full understanding of the unique characteristics of the schools they served.").

In regard to outcomes, Kentucky is one of three states that shows statistically significant progress on NAEP grade 4 reading assessments and grade 8 mathematics assessments. But there is no robust evidence of sustained comprehensive district-level improvement of the sort seen in Texas and North Carolina. Compare GAINING GROUND, *supra* note 99, at 16 with *supra* notes 215, 274-81 and accompanying text (discussing Texas and North Carolina).

363. See Blair, *supra* note 362, at 19.

364. See Anne T. Henderson & Beverly Raimondo, *Citizens Tackle School District's Achievement Gap*, NAT'L MIDDLE SCH. ASS'N'S MIDDLE GROUND MAG., Feb. 2002, at 22; EVERY CHILD COUNTS: RAISING STUDENT ACHIEVEMENT IN THE MIDDLE GRADES, A REPORT FROM THE JEFFERSON COUNTY COMMUNITY ACCOUNTABILITY TEAM (2001), available at [http://www.cipl.org/pubs/cat/every\\_child.pdf](http://www.cipl.org/pubs/cat/every_child.pdf); Press Release, The Prichard Committee for Academic Excellence, Every Child Counts: CAT Team Releases Report on Jefferson County Middle Schools (Jan. 18, 2001), available at <http://www.prichardcommittee.org/news/010118catreport.html>; THE PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE, 2000-2001 BIENNIAL REPORT 6, available at

Committee and with financial support from the Edna McConnell Clark Foundation, the team was composed of parents, community volunteers, Prichard Committee members and business leaders. Its core members were graduates of the Commonwealth Institute for Parent Leadership, an institution created two years earlier by the Prichard Committee to train selected parents and community activists statewide in building partnerships with teachers and principals and implementing educational reforms at the local level.

The Community Accountability Team used the accountability and assessment framework created by KERA to undertake a sustained review of Jefferson County middle schools. First, disaggregating the district's achievement data in a way that is routine in high-performing Texas districts, the accountability team discovered dramatic disparities in the performance of subpopulations that previously had gone little remarked in a district where aggregate achievement compares favorably with that in other large urban school systems. Next, the outside team undertook a shadowing study of five representative middle schools (the level where the gaps were greatest) to uncover the reasons for the differences in performance—again using a kind of comparative assessment of school practices that is routine in robustly improving districts in New York City and Texas. Their key recommendations were to refocus staff development so that teachers can develop lessons linked to engaging standards and to provide more individualized instruction—structures and principles, once again, that are regarded as fundamental in New York City's District 2 and the successful Texas districts.<sup>365</sup>

An upshot of the committee's work was the passage in 2002 of a law requiring the KDE to provide every school council in the state (or principal if there is no council) data on student performance on statewide tests that is disaggregated by race, sex, and economic status.<sup>366</sup> In turn, the school-based councils (or principals) are required to involve parents, faculty and staff in setting biennial targets for eliminating achievement gaps and to review and adjust these plans as needed. This measure does Texas one better by making the data-driven reduction of achievement gaps a central focus of school organization and assessment.<sup>367</sup>

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<http://www.cipl.org/pubs/report2000-2001.pdf>.

365. For an evaluation of the Accountability Team's work, see ANNE C. LEWIS, *THE COMMUNITY ACCOUNTABILITY TEAM IN LOUISVILLE: WAKING A SLEEPING GIANT* (2002), available at [http://www.prichardcommittee.org/pubs/cat/sleeping\\_giant.pdf](http://www.prichardcommittee.org/pubs/cat/sleeping_giant.pdf). This report was controversial because, in the eyes of the Jefferson County School District, it unjustly accused officials of tolerating disparate treatment in the past and did not credit them sufficiently for their extensive collaboration with the outside accountability team. See Beverly Derington Moore & Sherry De Marsh, *Dissenting Commentary*, in *id.* app.1 & app.2.

366. Act of April 9, 2002, ch. 302, 2002 Ky. Rev. Stat. R. Serv. 972 (Banks-Baldwin) (codified at KY. REV. STAT. ANN. § 158.649 (Michie Supp. 2002)).

367. *Id.* Leaders of the Prichard Committee had recognized the absence of racial disaggregation of school outcomes within the Kentucky accountability system as a deficiency at least since the late 1990s, based explicitly on a comparison with the Texas system. See Schafter &



These developments are two-edged. On the one side, insofar as the KERA framework was intended to create a self-sustaining mechanism of reform through accountability, the formation of a citizen's committee to hold the Jefferson County schools to account and to help them determine how to meet their responsibilities is evidence that the reformed institutions are not working as designed. On the other side, the extent to which the KERA framework legitimated and facilitated sustained collaboration between a concerned public and educational insiders suggests that the KERA framework could be in some more extended sense self-correcting: It may encourage the formation of new publics that can identify the deficiencies of current operations and equip them with some of the tools for undertaking improvements. From this perspective, the reorientation of the Prichard Commission from a state-level actor interested in local affairs mainly to generate support for legislative reform to a catalyst of truly local attempts at thoroughgoing reorganization may be a harbinger of a fundamental redirection of the Kentucky model of reform from the outside in. As we discuss below, this revised model might then provide a novel and effective way to connect the professional movement for reform exemplified by New York City's District 2 to the concerns of the broader public.

#### IV.

##### WHY THE NEW COLLECTIVE ACTION WORKS: SOME FIRST NOTES ON POLITICS IN THE AGE OF NON-COURT-CENTRIC JUDICIAL REVIEW

The large reforms we have described in Texas and Kentucky affront deep-seated assumptions about the possibilities of fundamental innovation in advanced industrial societies. For many, skepticism about the possibility of encompassing reform is rooted in convictions about the difficulties of collective action: Under many circumstances, it just doesn't pay for people to get involved in struggles that might be of great benefit to their lives, or to make sure the reformed institutions that result from successful battles continue to serve their interests.

For some, particularly reform-minded lawyers, the legal system itself might be an obstacle, independent of collective action problems. In Part I, we saw that the courts have repeatedly failed as an Archimedean point from which to transform the American school system. Is there reason to suppose that this new reform cycle will be different, and that the courts will promote changes aimed at achieving objectives that eluded school desegregation and finance equity campaigns in the past?

##### *A. New Publics?*

In the standard logic of collective action, compact minorities use the apparatus of democracy to extract such substantial benefits for themselves that

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Greenawalt, *supra* note 291, at 29.

the per capita share of the prospective bounty is sufficient to galvanize each coalition member into action.<sup>368</sup> Diffuse majorities allow the public interest to be hijacked in this way because the gains to each member of the opposition are outweighed by the costs.<sup>369</sup> Thus understood, the selfish power of minorities is often invoked by advocates of school privatization to explain why it is so hard to reform large, public institutions, and why the few reforms that do succeed are so often diverted from their original purpose.<sup>370</sup>

The education reforms we have detailed suggest, perhaps unexpectedly, that these arguments apply in reverse. When policies manifestly fail the public, the resulting crisis opens the way to a new logic of collective action. In a slight exaggeration (of the sort of which no stylization is innocent), this new collective action transposes the roles assigned by the first. Robbed of any public legitimacy, entrenched interests are exposed as only self-seeking and can be pushed aside by diffuse coalitions that can claim substantial resources for reform projects in the name of the public good. This section sketches the conditions under which such new publics can arise, contrasts them with familiar social movements, and identifies two threats to which their very successes expose them.

Typically, we saw, the new coalitions ally disaffected insiders from the old system whose professionalism is deeply offended by the deterioration of conditions with citizens and business groups dependent on the failing public service and with political reformers whose larger agendas are validated by the breakdown of the old system and the prospect of renewing it. Once this coalition acquires an identity, however fragile, its very existence becomes a lightning rod for widespread public dissatisfaction with the current state of affairs in general and at the failings of the insiders in particular. A profusion of grassroots initiatives and mass manifestations of public interest in reform of the sorts noted above in the discussions of Texas and Kentucky is the result. Enterprising politicians are quick to put themselves ahead of a movement that might otherwise turn against them.<sup>371</sup>

As the case studies have shown, courts often play a crucial role in the emergence of these new forms of collective action, and public advocates of school reform through litigation have tried to turn this development to their benefit. In New York, for example, the advocates in a fiscal equity suit are try-

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368. *See, e.g.*, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOOD AND THE THEORY OF GROUPS* (1965).

369. *See, e.g.*, MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982). As a background condition, this logic presumes, often implicitly, that the policies pursued by the concentrated minorities are also of some benefit to the public at large. These "payoffs" form part of the calculus of consent by which dispersed majorities acquiesce in policies that in some measure expropriate them. ADAM PRZEWORSKI, *CAPITALISM AND SOCIAL DEMOCRACY* (1985).

370. *See, e.g.*, CHUBB & MOE, *supra* note 12.

371. *See supra* notes 219–49, 298–333 and accompanying text.

ing to assemble a coalition of dissident professionals and community-based elements. Grassroots are built through a technique called "Public Engagement."<sup>372</sup> The reformers organize many local "focus group discussions" of school reform hosted by community-based organizations.<sup>373</sup> The results of the discussion provide, in theory, a glimpse of authentic community sentiment unperturbed by routinized partisan conflict and undistorted by the filtration of issues and agendas through the media. Affiliation with a multitude of local host organizations suggests a broad base of continuing institutional support. The New York experience and others like it draw explicitly on the experience of the Prichard Committee in Kentucky.<sup>374</sup> Following its example, the aim is to ensure both that the legal remedy demanded in a fiscal equity suit against the state meets the dual test of "public" and "expert" opinion and that it is more compelling to the court and eventually the legislature because it does.<sup>375</sup>

These campaigns, of course, sometimes fail. In Alabama and Ohio, for example, they have been checked by the established interests, acting in part through familiar channels and in part using their own techniques of "public engagement" to resist reform.<sup>376</sup> But looking across the country the reformers read the evidence of recent debates on school reform, correctly we believe, as an indication that the broad public will at least tolerate an assault on the established interests; that the latter are on the defensive, though far from routed; and that state supreme courts attuned to this shift in the political winds and attracted by the collaborative institutional possibilities associated with the adequacy (as op-

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372. See Jacqueline P. Danzberger & Will Friedman, 'Public Conversations About the Public's Schools': *The Public Agenda/Institute for Educational Leadership Town Meeting Project*, 78 PHI DELTA KAPPAN 744 (1997); Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neal—and a Proposed Solution*, 29 CONN. L. REV. 1115 (1997); Deborah Wadsworth, *Building a Strategy for Successful Public Engagement*, 78 PHI DELTA KAPPAN 749 (1997); Campaign For Fiscal Equity, *The Courts and Public Engagement: The New York Experience* (Apr. 26, 2000) (unpublished manuscript, on file with NYU Review of Law & Social Change); Michael Rebell, *Public Engagement and the Courts: A Proposed Constitutional Colloquy* (April 2000) (unpublished manuscript, on file with NYU Review of Law & Social Change); Selected Readings Prepared for Conference on Public Engagement, Education Reform and the Courts, (May 2000) (on file with NYU Review of Law & Social Change) [hereinafter *Selected Readings*]. See also George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on State Court School Finance Decisions*, 35 B.C. L. REV. 543 (1994) (arguing that state courts are more advisory and dialogic and less managerial than federal courts in education reform setting); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1771–72 (1993).

373. See, e.g., Campaign for Fiscal Equity, *Blueprint for Better Schools: Definition of a Sound Basic Education; Statewide Fair Funding Principles; Principles for Effective Accountability*, at app. (Fall 1999), in *Selected Readings*, *supra* note 372, at 166–69 (listing organizations that participated in public engagement discussions in New York State during 1999).

374. See Campaign for Fiscal Equity, *Studies in Judicial Remedies and Public Engagement*, in *Selected Readings*, *supra* note 372, at 189–99.

375. Rebell, *supra* note 372, at 110.

376. See *Selected Readings*, *supra* note 372, at 170–75, 204–10 (presenting summaries of case studies of school reform debates in Alabama and Ohio, among other states).

posed to equity) doctrine are open to change.<sup>377</sup> Indeed, school reform plaintiffs have prevailed in eighteen of twenty-eight of the relevant decisions in the highest state courts since 1989.<sup>378</sup> The No Child Left Behind Act of 2001, we argue below, will make defense of the legal status quo still more difficult, not least by making school improvement a matter of urgent local concern across the country.<sup>379</sup>

The same constellation of dissident insiders and publicly-minded outsiders has emerged in cities such as Los Angeles, San Francisco, Chicago and Philadelphia in the absence of substantial intervention by courts and legislatures. In these cities and in other settings besides, "civic-minded" reforms mobilized hundreds of millions of dollars of philanthropy to change practices at the classroom, school or district level, typically by fostering new forms of professional development.<sup>380</sup>

Because these initiatives quickly discovered the need to change framework rules, if only to create free spaces within which to experiment, unperturbed, with new solutions, they soon engaged in a form of political advocacy. In doing so, they discovered the possibility of the new collective action.<sup>381</sup> Because of their dissatisfaction with existing hierarchies, and because their own initiatives required them to operate across the boundaries of established institutions, they quickly discovered as well the need to stabilize new forms of local participation operating within the current school system but contributing by design to its incremental transformation.<sup>382</sup> These "private" reform movements often yield a profusion of local innovation that dissipates for want of an encompassing political and (new) administrative framework. They tend, therefore, to be more fragile than the "public" reforms on which we have focused, but not fundamentally different in the constituencies they aim to mobilize.

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377. See Rebell, *supra* note 372.

378. See Michael A. Rebell, *Education Adequacy Litigation and the Quest for Equal Educational Opportunity*, in ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY, *supra* note 6, at 228 n.54.

379. See *infra* notes 495–512 and accompanying text.

380. See Joseph P. McDonald et al., Agents of Reform: The Role and Function of Intermediary Organizations in the Annenberg Challenge 4–6 (Apr. 27, 2000) (paper presented at the Annual Meeting, American Educational Research Association, on file with NYU Review of Law & Social Change). In describing the response to a \$500 million Annenberg Challenge grant for school reform at the municipal, regional and national levels, McDonald and his colleagues have documented the emergence of a number of intermediary organizations funded by Annenberg and other foundations to organize reform efforts in particular areas of the country. The authors found that the organizations played one or more of "five distinct roles": champions of reform, educators, political advocates, program developers and management coaches. See *id.* at 7–8. In addition to the listed roles, however, the report provides evidence that nearly all of the organizations also performed a sort of meta-function of continuously redefining the purposes and architecture of the reforms being supported even as the reforms were being implemented, while using the initiatives' results in the way of improved student outcomes as an important guide in this ongoing reconsideration. See *id.* at 19–20.

381. See, e.g., *id.* at 8–10, 12–15.

382. See *id.* at 11–17.

The similarities between these initiatives and the changes in Texas and Kentucky were obscured by the "civic-minded" reformers' distrust of the public school system and probably also the public school system's distrust of the reformers. For roughly the first half of the last decade, the private organizations operated independently of, and often in opposition to, what almost without regard to the actual content and potential of the officially sponsored changes they assumed were "policy-minded" or managerial efforts to patch the public school system.<sup>383</sup> But as the substantive goals of large-scale public reform have come in some leading cases to converge with the goals of the "private" initiatives, the two strategies, and the possibilities for collective action on which they depend, seem no longer to be alternatives but instead paths to the same end.

The case that deviates most from this pattern of alliance between insiders and outsiders is New York City's District 2. There, we saw, professional culture is so strong and buffered from the surrounding bureaucratic and political environment, that it has been possible to create largely self-sustaining transformations under the leadership of reformist insiders.<sup>384</sup> But as the most thoughtfully admiring observers of these successes have recognized, they depend on fortuitous inversions of the normal subordination of classroom activity to administrative routine and interest group politics that typically dominate American public schools.<sup>385</sup> Professional recrudescence may be a necessary condition of reform, but only in extraordinary circumstances is it a sufficient one.

These new forms of collective action overlap with but are distinct from the "new social movements."<sup>386</sup> The latter, originally conceived as the successors to the Marxist proletariat, refer to emergent, potentially transformative, groupings or identities not rooted in the division of labor.<sup>387</sup> Feminism, the civil and human rights movements, and the movement for gay rights are typical examples.<sup>388</sup>

383. See *id.* at 4–5.

384. See *supra* notes 142–61 and accompanying text.

385. See ELMORE, *supra* note 148, at 5–10. Put another way, although District 2-style professional training of school leaders to make them the handmaidens of continuous reform of classroom practice is almost certainly a necessary part of a reformed school system, it is unlikely that it can be the sole fulcrum of reform given the isolation of most progressive professionals in the current system.

386. See, e.g., HANSPETER KRIESI ET AL., *NEW SOCIAL MOVEMENTS IN EUROPE: A COMPARATIVE ANALYSIS* (1995); Steven M. Buechler, *New Social Movement Theories*, 36 SOC. Q. 441 (1995); Russell J. Dalton, Manfred Kuechler, & Wilhelm Burklin, *The Challenge of New Movements*, in *CHALLENGING THE POLITICAL ORDER: NEW SOCIAL AND POLITICAL MOVEMENTS IN WESTERN DEMOCRACIES* 3–20 (Russell J. Dalton & Manfred Keuchler eds., 1990); Hank Johnston, Enrique Larana & Joseph Gusfield, *Identities, Grievances, and New Social Movements*, in *id.* at 84–101; Gunnar Oloffson, *After the Working-Class Movement? An Essay on What's 'New' and What's 'Social' in the New Social Movements*, 31 ACT SOCIOLOGICA 15 (1988); Nelson A. Pichardo, *New Social Movements: A Critical Review*, 23 ANN. REV. OF SOC'Y 411 (1997).

387. See, e.g., SIDNEY G. TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2d ed. 1998).

388. See, e.g., Margit Mayer & Roland Roth, *New Social Movements and the Transformation to Post-Fordist Society*, in *CULTURAL POLITICS AND SOCIAL MOVEMENTS* 311 (Marcy Darnovsky et al. eds., 1995).

Like these, the movement for school reform mobilizes citizens to disrupt established patterns of authority in favor of an arguably more equitable alternative. But unlike the new social movements, school reform does not emphasize articulation and official recognition by the state of the identity of a distinctive group. Nor does it aim to secure justice for its partisans or potential beneficiaries by seeking statutory or constitutional protection for them against various, precisely delimited forms of discrimination or abuse. Rather, it aims to establish a new form of participatory collaboration between citizens and the agencies of government.

Compared to the typical new social movement, the movement for school reform is less “militant” in the period when it is mobilizing citizens for change, although it is far from docile. But over the long haul, the school reform movement is more “activist” in the sense of encouraging, or even requiring, more sustained participation in the ongoing operations of the reformed institutions. For instance, the protest marches associated with the civil rights movement intuitively embody a “higher” degree of mobilization than the statewide town meetings organized by the Prichard Committee at the height of its public agitation. But the new responsibilities of parents engaged, for instance, in local improvement planning in response to a finding by the state that their children’s school has failed its pupils, or at least those of color, requires more sustained engagement with the machinery of governance than does even a personally risky visit by a person of color to a racially segregated department store or restaurant. In the case of integration, persons formerly denied full enjoyment of their rights of citizenship joined the established public. In the case of the new school reforms, citizens broadly aggrieved by the performance of their institutions agree to renew them, and some of their number assume special responsibilities for the undertaking.<sup>389</sup>

Whether or not the transformations of the *personal* identities of participants and the allocation of authority to public and private entities caused by these new reforms is more or less consequential than those achieved by the new social

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389. Environmentalism is a kind of hybrid or halfway house between the new social movements and the novel forms of civic engagement connected with school reform. On the one hand, some parts of the environmental movement are closely akin to identity politics. For this kind of environmentalist, the world is divided between those who will make sacrifices to protect nature against human predation and those who, knowingly or not, profit from the despoilment of the earth. On the other hand, a substantial part of the environmental movement combines public protest with problem-solving collaboration among public authorities and private interest groups—for example, in the restoration of complex habitats. See SABEL, FUNG & KARKKAINEN, *supra* note 23, at 3–9. The emergent school reform movement is akin to environmentalism in enjoying broad support that cuts across many traditional political divisions. See, e.g., Angela B. Mertig & Riley E. Dunlap, *Environmentalism, New Social Movements, and the New Class: A Cross-National Investigation*, 66 *RURAL SOC’Y* 113 (2001). For a discussion of school desegregation, particularly in certain multi-district contexts, as a form of political, not mainly educational reform, that also locates the endeavor somewhere between the new social movements and the forms of civic engagement sketched in this Article, see Liebman, *supra* note 29, at 1614–35; other sources cited *supra* note 76.

movements is open to question. But either way, it seems appropriate to conceive of the new forms of collective action as constituting new *publics*—new and arguably transformative forms of civic engagement that aim and have the power to change both the decisions and the forms of decision-making of representative democracy.

Assuming, as we do, that these new publics will frequently succeed in displacing the established interests, they will themselves face at least three serious threats. One is that the new coalition, having dislodged the old, is unable to put any coherent regime in its place. The unintended effect of its success, therefore, is to encourage a wildcat devolution of authority that gives fortunate localities the freedom to prosper but offers no help to the unfortunate ones that need it. Some argue that this will be the effect, for example, of the federal No Child Behind Act. We return to this possibility below.<sup>390</sup>

The second threat is familiar from the skeptical interpretation of developments in Kentucky, insofar as that judgment is not eventually modified by the kind of reorientation signaled by the formation of the Community Accountability Team in Jefferson County.<sup>391</sup> It is that the new political coalition, emboldened by its success in battle, forgets its commitments to local autonomy and tries to reorganize the schools by fine-tuning standards from the commanding heights of the state supreme court or the state legislature.<sup>392</sup> As criticism of the No Child Left Behind Act further suggests, this reassertion of centralized control might come as much from those (on the “left”?) interested in diagnostic standards as those (on the “right”?) interested in discrediting public schools entirely using high-stakes outcome measures.

The third danger is the reassertion of professional technocratic control under the cover of the new decentralization of authority to schools and districts. Once the reformed system is up and running, the fine-grained decisions about what and how to teach will be made by teachers, principals, and district officials. Their decisions will be subject to peer review and the public scrutiny afforded by the new accountability systems. But it would be foolhardy to think that the reformed professionals, while reviling the hierarchies built by their Progressive ancestors, have no selfish or shortsighted interests themselves, or that the accountability system automatically and infallibly eliminates these from the calculus of decision making.

In all three cases, an indispensable element of an effective response is the constitution of a local, countervailing power. Parents and others must have the political capacity, rooted in and responsive to the needs of their communities, to challenge attempts at re-centralization or power grabs by professionals or resurgent local oligarchs. And they must have the data and disposition to do so in a way that reinforces, rather than undermines, the key features of the new

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390. See *infra* notes 485–94 and accompanying text.

391. See *supra* notes 364–67 and accompanying text.

392. See *supra* notes 354–63 and accompanying text.

system.<sup>393</sup>

The necessary local capacity might grow from traditional community-based activism, or from the opening of the schools to the community through the new professionalism itself, or perhaps from the interaction of novel combinations of insiders and outsiders. Each potential line of development faces obstacles, however, or at least important imponderables. More to illustrate the nature of the emerging problems than to suggest even a preliminary resolution, we note both the promise and problems of each.

Traditional community-based organizations seem to be the natural starting points for the development of a new countervailing power. They are, after all, the local associations with the most experience fighting for fair housing, safe streets and jobs. Because the health of local schools is increasingly seen as indispensable to the health of communities, many of these groups have become concerned with organizing for school improvements as well. A recent report by New York University's Institute for Education and Social Policy suggests that there are almost 200 community groups engaged in education organizing, with new groups emerging rapidly and established ones taking up education as an issue. Coalitions of such groups also are forming to influence school policy.<sup>394</sup>

A key obstacle these groups face is their close kinship to social movements. Like those movements, these groups are expert at disrupting business as usual to gain a fairer share of centrally distributed benefits. But they have less experience shaping connected decisions on multiple organizational levels in an ongoing way. The result, the NYU report found, is a frustrating oscillation from traditional issues that easily focus community attention to systemic concerns that do not, and back:

As groups identify and choose organizing issues, they do not progress from initial concerns about adequate facilities and safety in the lunchroom—what we call presenting issues—to issues about improving the instructional core of schooling. Instead, groups seem to spiral continuously from presenting issues to core issues and back again.<sup>395</sup>

The idea that the organizational problem has conceptual roots is further supported by the report's finding of a systematic mismatch between the goals of the

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393. See Joshua Cohen & Joel Rogers, *Power and Reason*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNMENT 237 (Archon Fung & Eric Olin Wright eds., 2003) available at <http://www.ssc.wisc.edu/~wright/Deepening.pdf>; Archon Fung, *Collaboration and Countervailing Power: Making Participatory Governance Work* (2002) (unpublished manuscript), available at <http://www.archonfung.com/docs/pal218/Collab2.pdf>.

394. KAVITHA MEDIRATTA & NORM FRUCHTER, MAPPING THE FIELD OF ORGANIZING FOR SCHOOL IMPROVEMENT: A REPORT ON EDUCATION ORGANIZING IN BALTIMORE, CHICAGO, LOS ANGELES, THE MISSISSIPPI DELTA, NEW YORK CITY, PHILADELPHIA, SAN FRANCISCO AND WASHINGTON D.C. 5 (2001), available at [http://www.nyu.edu/iesp/publications/cip/mapping/mapping\\_final\\_report.pdf](http://www.nyu.edu/iesp/publications/cip/mapping/mapping_final_report.pdf). For additional reports in this vein, see The Cross City Campaign for Urban School Reform website, <http://www.crosscity.org> (last visited Nov. 22, 2003).

395. MEDIRATTA & FRUCHTER, *supra* note 394, at 34.



community organizers engaged in community organizing and the goals of the school reformers themselves, as summarized in the following figure:

*Central Issues of Educators Versus Community Organizing Groups*<sup>396</sup>

| Issues Central to the Learning Community Of Educators in School Reform   | Issues Central to the Agendas of Community Organizing Groups and Their Constituencies  |
|--|--|
| <p>Professional collaboration and creating learning communities;</p> <p>Authentic assessment and examination of student work;</p> <p>New teacher support;</p> <p>Standards implementation;</p> <p>Role of the district in reform;</p> <p>Site management;</p> <p>Academic support programs and interventions;</p> <p>Literacy development;</p> <p>Instructional strategies for English learners;</p> <p>Block scheduling, "families" and academy groupings—and other structural forms of creating smaller and more personalized units.</p> | <p>Discipline and the criminalization of youth;</p> <p>Distribution of resources;</p> <p>Tracking;</p> <p>High stakes testing;</p> <p>Curriculum inclusiveness (ethnic studies, etc.);</p> <p>Youth empowerment;</p> <p>Safety;</p> <p>Quality of teaching/relationships;</p> <p>Language access and bilingual education;</p> <p>Facilities (repairs, overcrowding, toxics, etc.);</p> <p>Quality of relationships—how children and parents are treated;</p> <p>Superintendent selection;</p> <p>School privatization.</p> |

But this juxtaposition overstates the divide between the two worlds. Both sides are aware of the difficulties of establishing a common language that allows for productive joint discussion of their shared concern for making schools work. National groups such as the Cross City Campaign for Urban School Reform, an

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396. *Id.* at 45 fig.13.

alliance of school reform organizations in Baltimore, Chicago, Denver, New York, Oakland and other major cities, are addressing the problem directly. Recently, the Campaign set out to define indicators of school improvement that reflect the interests of both professional reformers and community activists, while at the same time articulating concepts such as “reciprocal accountability” to identify each sides’ obligations in the setting of standards-based reform.<sup>397</sup> Local efforts to integrate the concerns of both groups are also taking place.<sup>398</sup>

One of the most incisive efforts to locate the common ground between school reformers and community parents is Research for Democracy. Research for Democracy is a joint project of the Temple University Center for Public Policy and the Eastern Pennsylvania Organizing Project, a coalition of community- and faith-based democratic organizations working for neighborhood improvement in Philadelphia.<sup>399</sup> Instead of reporting the views of representative institutions—community-based organizations on the one hand and lead school reformers on the other—Research for Democracy conducted a random survey in Philadelphia in 2002 of the underlying constituencies of both parents and school teachers. Although 92% of the parents in the survey did say that safer schools were a “very important” priority for school reform in Philadelphia, 80% or more of them also considered higher academic standards, better professional development, lower class size *and* a more equitable distribution of resources to be “very important.” Given that only 58% of the parents ranked maintenance of school buildings at that same level of importance, the report concludes that “the traditional view of parents as only concerned with safety and building conditions is inaccurate.”<sup>400</sup>

Even more surprising is the finding that Philadelphia parents have substantially more ambitious educational goals for their children than do the children’s teachers. Only 41% of the teachers thought their schools should give more emphasis to teaching students to think critically, whereas 82% of the parents identified this as an important goal. Again, 41% of the teachers wanted more emphasis on preparing students for college, while 87% of the parents wanted better college preparation for their children. Eighty-nine percent of the parents wanted more attention to the students’ reading and 67% wanted better preparation for student tests, compared to only 21% and 20% of the teachers. The only

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397. EVA GOLD & ELAINE SIMON, *SUCCESSFUL COMMUNITY ORGANIZING FOR SCHOOL REFORM* (2002), available at <http://www.crosscity.org/pdfs/stnrbhrdssrschls.pdf>. See also LAUREN E. ALLEN & ANNE C. HALLETT, *BEYOND FINGER-POINTING AND TEST SCORES* (1998), available at <http://www.crosscity.org/pdfs/beyondfinger.pdf>.

398. See, e.g., Community Collaborative to Improve District 9 Schools, Platform for Educational Improvement in District 9 (undated) (draft manuscript, on file with NYU Review of Law & Social Change).

399. See Eastern Philadelphia Organizing Project website, at <http://www.epopleaders.org> (last visited Nov. 22, 2003).

400. RESEARCH FOR DEMOCRACY, *A RIGHT TO KNOW: A PARENT-TEACHER STRATEGY TO IMPROVE TEACHING AND LEARNING IN THE PHILADELPHIA PUBLIC SCHOOLS 17* (2002), available at <http://www.temple.edu/CPP/content/reports/arighttoknowreport.pdf>.

area where the teachers were more zealous in the pursuit of educational goals than the parents concerned student moral and ethical development, where 81% of the teachers saw a need for more emphasis, as against 56% of the parents.<sup>401</sup>

Notwithstanding the divergent views of reformers and organizers, therefore, the deep divide may run within the professional community itself, not between communities and reforming schools. If so, initiatives such as the Cross City Campaign and Research for Democracy may prove indispensable to creating a political context within which professional reformers can ally with parents to get the new reforms adopted and keep them flourishing. Likewise, some of the most powerful and widely-watched community-based organizations, such as the Southwest Region of the Industrial Areas Foundation ("IAF"), a federation of largely Hispanic community organizations directed by Ernesto Cortes, Jr., are trying to develop a "critical friendship" with reforming schools in Austin and elsewhere in Texas that secures a community voice in the operation of the decentralized institutions while also transforming traditional organizing.<sup>402</sup>

A convergent fusion of professional and community reform efforts might alternatively arise from the professional-based reform of the schools. The logic that devolves decision-making, with accountability, from district to school to classroom can plainly be extended to include families. This is already happening at least sporadically. For example, before becoming superintendent of New York City's District 2, Shelley Harwayne organized groups of school parents at Manhattan New School, where she was principal, to recount their life stories to each other under the guidance of a teacher in writing groups. In this way the parents learned to trust and work with one another while learning firsthand something of what their children did in class, what they could do to help, and, perhaps, how to criticize the school's decisions from the vantage point of a shared understanding of its goals.<sup>403</sup> The Patrick O'Hearn Elementary School in Boston goes considerably further in institutionalizing parent involvement in reading instruction and in school planning generally.<sup>404</sup> If such forms of participation proliferate, community-based organizations such as the IAF might work to federate the local bodies, advising them on effective countervailing dealings with schools and learning themselves how to exercise the new kinds of participatory power at higher levels of aggregation.

A third possibility could arise from novel constellations of local and state-wide or national groups that individually and collectively grow out of and

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401. *Id.* at 22.

402. For a detailed case study of IAF intervention in the Austin schools, see ELAINE SIMON & EVA GOLD, CASE STUDY: AUSTIN INTERFAITH, STRONG NEIGHBORHOODS, STRONG SCHOOLS (2002). For background on Cortes and the IAF see Cheryl Dahle, *Social Justice: Ernesto Cortes, Jr.*, FAST COMPANY, Dec. 1999, at 294. The IAF was not one of the groups studied in the NYU report. See MEDIRATTA & FRUCHTER, *supra* note 394.

403. HARWAYNE, *supra* note 161, at 171-76.

404. See Patrick O'Hearn Elementary School website, at <http://boston.k12.ma.us/schools/rc373.asp#intro> (last visited Nov. 22, 2003).

contribute to the progress of systemic reform. Consider, for example, changes in the work of Kentucky's Prichard Committee. As we discuss above, the committee began essentially as a statewide lobbying organization for educational reform legislation.<sup>405</sup> More recently, however, through its sponsorship of the Commonwealth Leadership Institute and its support of the Community Accountability Team in Jefferson County, the Committee has been transforming itself into an organization at the service of local reform groups. The state and local groups have worked together to use data generated by the state's accountability machinery to make reform work—and, as we saw, to reform the accountability system itself.<sup>406</sup> If this development is generalized, one result would be a group of truly local Prichard/Community Accountability Teams linked both to their home communities and to the institutional viscera of their corresponding schools as well as to the statewide network. Another result would be a rejuvenated statewide Prichard Committee able to intervene more effectively at the legislative level, given its deep knowledge of local affairs, and better able to aid the local committees because of its ability to pool experience statewide. This relation of “top” to “bottom” is familiar: The “apex” of this novel public interest movement would be at the service of its local “bases” in something of the way districts and the principals become providers of services to their notional subordinates in reforming school systems.

Something analogous could be emerging at the national level. Groups such as the Citizens' Commission on Civil Rights (a collaborator with Research for Democracy in the Philadelphia parent-teacher survey discussed above) are making detailed systematic efforts to categorize the performance of states in meeting the new federal accountability requirements that we discuss below.<sup>407</sup> They also train advocates to use the information-disclosure provisions of the new accountability systems to assess school performance, and they illustrate through case studies of successful schools with poor and minority populations how data-driven comparisons of rapidly improving and failing schools with similar populations might be used to motivate reform at the latter institutions.<sup>408</sup> In time the Citizens' Commission on Civil Rights and other organizations like it might provide just the kinds of services to statewide and regional advocacy groups that the Prichard Commission is beginning to provide to local advocacy groups in Kentucky.

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405. See *supra* notes 296–331 and accompanying text.

406. See *supra* notes 364–67 and accompanying text.

407. See Citizens' Commission on Civil Rights website, <http://www.cccr.org> (last visited Nov. 22, 2003); RAISING STANDARDS, CLOSING GAPS, FINDINGS FROM THE CITIZENS' COMMISSION ON CIVIL RIGHTS TITLE I MONITORING PROGRAM (2002) [hereinafter RAISING STANDARDS, CLOSING GAPS], available at [http://www.temple.edu/CPP/rfd/Raising\\_Standards\\_Closing\\_Gaps.pdf](http://www.temple.edu/CPP/rfd/Raising_Standards_Closing_Gaps.pdf); *infra* notes 429–72 and accompanying text.

408. See RAISING STANDARDS, CLOSING GAPS, *supra* note 407; CITIZENS' COMMISSION ON CIVIL RIGHTS, WILL TITLE I LEAVE NO CHILD BEHIND? (2002), available at [http://www.temple.edu/CPP/rfd/Will\\_TitleI\\_Leave\\_No\\_Child\\_Behind.pdf](http://www.temple.edu/CPP/rfd/Will_TitleI_Leave_No_Child_Behind.pdf).

But these remarks about wholly novel public interest group constellations are conjectures. It is at least as likely that the new countervailing power, if it emerges at all, will have origins beyond our current imagination. All we can say for now is that without local participation, the surprising successes of the new logic of collective action in redefining the roles of the center and individual schools will be dangerously hostage to chance.

### *B. The New Meaning of Judicial Review*

Another source of skepticism about the robustness of the changes traced above concerns their relation to the law and the courts. What we are blandly calling new governance arrangements do not fit easily, if at all, within the basic categories of our democracy as understood by the American Legal Process School.<sup>409</sup> In that jurisprudential tradition, both the need for extensive government regulation of transactions and the separation of powers among the executive, legislature and judiciary are taken for granted. As we observed earlier, the central question posed for theorists of public decision-making and master practitioners of government—essentially law professors and federal judges—is the assignment of responsibility for changing rules at the margin to that branch of government best equipped to regulate in the public interest. Administrative experts are called on to resolve technical ambiguities in the regulation of private transactions. Legislators are required to settle political disputes. Judges decide which disputes are technical, which are political, and which they themselves can resolve by adjudicating disputes about contractual or property rights among private individuals.<sup>410</sup>

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409. See *supra* notes 38–39 and accompanying text.

410. See, e.g., HART & SACKS, *supra* note 38, at 70 (posing this central question in the context of the famous cantaloupe dispute: “Would the court of appeals have acted justly if it had relied solely upon an intuitive *ad hoc* sense of what is to be done when a carload of cantaloupes turns out to be spoiled . . . ? Or is it a central ingredient of justice that due respect be paid to prior institutional settlements which have a claim to being authoritative?”); *supra* notes 38–39 and accompanying text. See also HART & SACKS, *supra* note 38, at 75 (discussing importance of “the various assignments of legal power as well as the distribution of practical ability to make effective decisions which the law governing the interstate trade in fresh fruits . . . exhibits,” including “the role of private determinations,” “state law, including not only the general state law of contract and sales but state legislative and administrative power,” and “the federal government, including Congress, the Department of Agriculture, and the federal courts”); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*FIN DE SIÈCLE*) 118–19 (1997) (“The [Hart & Sacks] idea is that different law making institutions, including private parties, administration agencies, and legislatures, as well as state and federal courts, have intuitively accessible ‘jobs’ in the overarching scheme. It seems obviously desirable that each institution specialize in the job it does best. Any other solution threatens both organizational chaos and a reduction of the quality of outputs, because institutions will do jobs that will be ‘better’ performed by others. . . . There are two symmetrical sins in this model: to ignore policy when the judge should consider it (the case of the spoiled cantaloupes), and to apply policy analysis to questions that should be resolved ‘elsewhere’ (*Brown v. Board of Education*, for Herbert Wechsler).”); see also *id.* at 35–37 (treating Hart & Sacks as an important precursor to Ronald Dworkin’s and others’ “coherentist” vision of the law in which judges are so constrained by legal doctrine, principle, and the institutional division of labor that they are

Under the new architecture of reform laid out here, the legislature (at any level) is not setting precise goals but only general frameworks (often derived from the experiences of others in similar situations). Local units (teams of principals at the district level; teachers, parents, and students at schools) transform this general framework into particular goals. Using the local and supra-local standards generated by this process, the courts can periodically determine whether particular schools, districts, new administrative centers, and legislatures are providing constitutionally adequate levels of education. Put another way, in creating the infrastructure for generalizing successful local initiatives, holding poor performers to account, and periodically redefining framework rules, the legislature is not delegating authority for rule-making to the fourth, administrative, branch, nor is the court deferring to the legislature or to administrative rule-makers. Instead, in separate but complementary ways, both the legislature and the courts are exercising oversight over a new form of civic self-government.<sup>411</sup>

This new architecture is immediately suspect from the point of view of our Madisonian tradition of using the separation of powers to protect the people from the government and the government from the *demos*. The novelty is less alarming, however, from the standpoint of democratic accountability and constitutionalism broadly conceived. This is so precisely because the performance of local units, the center's response to that performance, and the legislature's response to that reaction can be scrutinized by the other actors, the public and eventually the courts in a way that is currently impossible. Whether this form of accountability amounts in the end to a neo-Madisonian successor to the discipline imposed on government by competition among the branches and between the states and federal level is a matter for another time.<sup>412</sup>

But there remains a special worry about judicial review. Although it was not self-evidently a part of the original Madisonian synthesis,<sup>413</sup> judicial review is now widely thought to be essential to the preservation and development of the constitutional protections that undergird our democracy.<sup>414</sup> Part I's account of periodic waves of court-driven school reform generally vindicates this view: In

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essentially compelled to find "right" answers even in "hard" cases).

411. See Dorf & Sabel, *A Constitution of Democratic Experimentalism*, *supra* note 23.

412. See JAMES S. LIEBMAN & BRANDON L. GARRETT, *THE FEDERALIST AND THE FOURTEENTH AMENDMENT* (forthcoming 2003) (arguing that central monitoring of local innovation is not *neo*-Madisonianism at all, but instead *classical* Madisonianism, which, to Madison's great disappointment at the Philadelphia Convention, the other framers rejected); SABEL, FUNG & KARKKAINEN, *supra* note 23, at 110–12 (advancing a neo-Madisonian interpretation of central monitoring of local experimentation); Dorf & Sabel, *Drug Treatment Courts*, *supra* note 23, at 881 (same).

413. For a discussion of the debate over the centrality of judicial review to the Madisonian scheme, see, for example, James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

414. See, e.g., FRANK MICHELMAN, *BRENNAN AND DEMOCRACY* (1999). For an opposing view, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

the cases of desegregation, school finance-equity, and more lately the right to an adequate education, citizens could avail themselves of courts when politics shut them out.<sup>415</sup> How, then, does the new architecture of reform recast the role of judicial review and the role of the judiciary more generally so as to capture the advantages of courts as a disentranching institution without embroiling them in the day-to-day reorganization of complex institutions that has repeatedly over-taxed their own institutional capacities?

Typically, judicial review in the context of complex institutional reform entails a choice among three courses of action, two of them patently unattractive. One unattractive possibility is for the court simply to defer to existing arrangements because the political branch continues to tolerate them. In this case, the courts' self-restraint can become an apology for political abuse.<sup>416</sup> A second and contrary, but also ineffectual, alternative is for the court to declare the institution unconstitutional; define the principles of constitutional operation; and then, eventually recognizing that the very administration that had produced the unconstitutional conditions is unlikely to remedy them, take control itself of transforming the troubled institution in accord with the constitutional principles. As our review of the role of courts in desegregation shows, the judiciary is neither able to translate constitutional values into crisp operating principles nor to manage the restructuring of complex institutions.<sup>417</sup> The third possibility is for courts to obligate the parties to work out a settlement that meets a constitutional standard.<sup>418</sup> But this apparently more appealing course of action often amounts to little more than a deferral of a choice between the first two alternatives. For once the parties have arrived at a settlement, often based on guesses about what the judge will do once they have or have not reached agreement, the court has to decide whether to defer to their decision—bow to the inevitable—or to assume direct control—attempt the impossible.

We believe, however, that this third possibility can be transformed into a true alternative to the first two. That belief is fueled by the success of adequacy-based school reform litigation in Texas and Kentucky in articulating standards and producing useful information about the performance of officials in elucidating and enforcing them. With respect to the articulation of both constitutional principles and feasible expectations of complying with them, the courts can rely on a vastly richer record of the actors' experience than was previously available to them. The same pooling of information that allows actors to learn from each other allows the court to learn what the actors as an ensemble can do, and in particular to learn of innovation both in the interpretation of principle and

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415. See *supra* notes 44–52 and 80–94 and accompanying text.

416. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975).

417. Compare Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), with *supra* notes 53–76 and accompanying text.

418. See, e.g., Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993).

in organizational design that otherwise might have remained unexplained and almost surely would have gone unnoticed. Just as important, it allows the courts to distinguish between good faith and bad faith efforts at compliance. Thus, a court in Texas can use the same information on comparable schools available to parents, teachers and administrators in order to determine if a particular school or district is violating the law. By the same token, the court can use this kind of information to determine whether the Texas Education Agency is living up to its obligation to support schools and districts that are at risk. So, too, by judging the response of the legislature to the TEA's efforts, the court can determine whether the political branch is meeting the obligation it has assumed in reaction to the judicial decrees.<sup>419</sup> Call this new form of judicial review "non-court-centric judicial review," because it allows the court to participate in a process of building a constitutional order, rather than imposing one or abandoning its obligation to do so.<sup>420</sup>

Notice that in arriving at this result, the courts and reformers are also—at least for now—resolving two longstanding, show-stopping dilemmas about judicial supervision of institutional reform in the name of constitutional values. The first is of particular moment to the redistributivist left. The other is more salient to the property-minded right.

The worry on the left, articulated by Frank Michelman among others, is that inequality-based arguments for school reform, and social reform generally, are doomed by conceptual indeterminacy.<sup>421</sup> On the one hand, the state could meet a constitutional obligation to treat all citizens equally by providing all with none of some good or service, leaving those unable to provide for themselves no better off than without the right to equal treatment.<sup>422</sup> On the other hand, arguments that the state is obligated to provide citizens with "minimum protection," i.e., with adequate amounts of goods and services necessary to citizenship (such as education), seemed conceptually sound but legally impracticable. As Michelman concluded, the "advantage" of the minimum protection hypothesis (if we would so regard it) remains utterly theoretical until (if ever) we can develop a justiciable standard for specifying the acceptable minimum and the acceptable gap. Absent such a standard, the supposed duty of minimum protection cannot be directly enforced; in fact, its violation cannot even be coherently alleged. Evidently, some notion of equality or nondiscrimination is needed to provide a

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419. See *supra* notes 239–46, 328–31 and accompanying text; *infra* text accompanying notes 505–06.

420. These paragraphs grow out of many conversations with Michael Dorf and William Simon. See Dorf & Sabel, *Drug Treatment Courts*, *supra* note 23, at 874–81; SABEL & SIMON, *supra* note 23.

421. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

422. *Id.* at 11. See *supra* notes 93–94, 240–41 and accompanying text (discussing the "leveling down" of resources for public schools that accompanied equity-based challenges to many states' mechanisms for funding education).



foothold for litigants and judges intent upon defining a grievance and fashioning a remedy.<sup>423</sup> The new standards and the institutional architecture that generates them, we argue, provide just such a foothold.

The concern on the right, often associated in Supreme Court matters with the opinions of Chief Justice Rehnquist, is that court-ordered institutional reform untethered from doctrinal constraints will violate the bedrock principle of private law that remedies be directly deduced from infringed rights.<sup>424</sup> In *Missouri v. Jenkins*,<sup>425</sup> for example, the Court severely limited a wide-ranging program of educational reconstruction that the district court had ordered as the remedy in a desegregation suit. Writing for a majority of the Court, Rehnquist cited approvingly a court of appeals judge's complaint that "this case, 'as it now proceeds, involves an exercise in pedagogical sociology, not constitutional adjudication.'"<sup>426</sup> Here, too, the new standards and the associated accountability regime substantially reduce the possibility for judicial caprice by giving substance to the interpretation of rights and remedies that courts cannot derive from doctrine alone.<sup>427</sup> Thus, to continue with the Texas example, a constitutionally *inadequate* education comes to mean one in which particular schools are not closing achievement gaps between African-American and white students to the extent that other comparable schools show to be possible. The corresponding remedy is for the laggards to adopt strategies with effects equivalent to those pursued by the leading schools and districts.

Notice, too, that this new kind of judicial review effaces familiar distinctions between public and private and between the sovereign and the citizen subjects. Because the legislative authorization is more a general framework for institutional experimentation in the elaboration of principle than the enactment of a well-defined public mandate, the court's role as constitutional guardian is not primarily to police the permissibility of the legislature's delegation of authority or the delegate's fidelity to legislative intentions. Rather, it is to collaborate via the continuing definition of standards with an emergent public in giving meaning to constitutional principle.

We set aside any assessment of whether this collaboration will prove successful in the long run, and whether, in any case, it is to be counted a (transformative?) gain for democracy. The least that can be said on the basis of the school examples is that non-court-centric constitutional review draws on deep changes in our civil society and our economy—whence the emergence of actors capable of engaging in the standards-setting that adequacy judgments suppose—to respond in a broadly public sense to both our continuing insistence

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423. Michelman, *supra* note 421, at 57.

424. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 417 (1977); *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

425. 515 U.S. 70 (1995).

426. *Id.* at 83 (quoting *Jenkins v. Missouri*, 19 F.3d 393, 404 (8th Cir. 1994) (Beam, J., dissenting)).

427. See SABEL & SIMON, *supra* note 23.

on respect for constitutional principle, and our dearly bought respect for the limitations of traditional forms of judicial intervention.

Such large constitutional questions could remain in the background as long as education reform proceeded state by state in the shadow of familiar institutions and doctrines. But with the passage of the No Child Left Behind Act of 2001 ("NCLB"),<sup>428</sup> which applies many of the principles of school reform discussed so far to the nation as a whole, they are likely to become of urgent practical relevance. In the next Part, therefore, we briefly characterize the NCLB and suggest the role that non-court-centric judicial review might play in the tug of war that is likely to ensue over its implementation.

## V.

### THE FEDERAL ROLE IN THE REFORM OF PUBLIC EDUCATION: THE NO CHILD LEFT BEHIND ACT AND ITS IMPLICATIONS

The NCLB was inspired by developments in Texas.<sup>429</sup> It inherits from that state the attractively transparent governance structure of districts and schools that exemplify the New Accountability. It also, however, inherits Texas's inattention to mechanisms by which states, districts and schools can share effective practices and learn directly from one another. Even where the NCLB is defective, however, it provides important handholds for improvement, just as reform in Texas and Kentucky permitted—even encouraged—structural changes that their statutes did not themselves anticipate.

Consider first the NCLB's generalization of Texas-style school governance. The Act for the most part imposes obligations on states and local education agencies ("LEAs," typically school districts) that receive federal funds under Title I of the Elementary and Secondary Education Act of 1965.<sup>430</sup> Those funds

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428. Pub. L. No. 107-110, 115 Stat. 1425 (2001). The ideas outlined in this Part are developed in more detail in Liebman & Sabel, *supra* note 23.

429. See, e.g., Brownstein, *For a Start*, *supra* note 26.

430. Title I is an \$8 billion-per-year program created as part of Lyndon Johnson's War on Poverty, in large measure as a consequence of the Civil Rights movement. The core idea was to provide supplemental funds to schools serving the most impoverished children in order to provide assistance that their families and schools could not. Originally, much of the money went to highly specialized programs directed to students judged to have one or more learning disabilities. Categorizing students in this way, with the result that they often were removed from regular classes in order to provide the additional services, has more recently been found to be disruptive to the point of being counterproductive. Accordingly, when Title I was reauthorized in 1994, it was amended to give state and local educators more discretion to use funds for purposes that they defined as, among other things, "effective approaches to whole reform." See Act of Oct. 20, 1994, Pub. L. No. 103-382, §§ 1002(g)(2), 1502(a), 108 Stat. 3519, 3522, 3604 (codified at 20 U.S.C. §§ 6302(g)(2), 6492(a) (2000) (repealed 2001)); Paul Weckstein, *Social Reform and Enforceable Rights to Quality Education*, in *LAW AND SCHOOL REFORM*, *supra* note 6, at 314–18. In return, Congress, imposing the bargain that was repeatedly attempted in this period (and indeed was anticipated by the previous reauthorization of the Act in 1988) but was only brought to fruition by the 2001 reauthorization, encouraged states (albeit ineffectually) to adopt accountability systems, created test-based improvement standards of its own, and insisted on increased evaluation and monitoring of results. See *id.* §§ 1101–20 (codified at 20 U.S.C. §§ 6301–6320 (2000) (repealed

are targeted on schools with the highest proportions of low-income families.<sup>431</sup> Under NCLB, states must: set “challenging academic content standards” and “student academic achievement standards” defining an adequate education for all schools and students in the state;<sup>432</sup> create annual standardized tests in literacy and mathematics (and subsequently science) in grades three through twelve that are aligned with those standards;<sup>433</sup> report the results of performance on these tests and other valid indicators for individual schools and for all relevant ethnic and socioeconomic subpopulations within those schools;<sup>434</sup> set goals for “annual yearly progress” (“AYP”) so that students in all the relevant subpopulations can be expected to meet the state standard of adequacy within twelve years;<sup>435</sup> require LEAs to present annual “report cards” ranking the performance of each of the relevant subpopulations at all of their schools on the state’s tests;<sup>436</sup> implement, more generally, an accountability system to assure that schools and

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2001)); see also Chun & Goertz, *supra* note 279, at 120; Gary Natriello & Edward L. McDill, *Title I: From Funding Mechanism to Educational Program*, in *HARD WORK*, *supra* note 279, at 31, 35–36 (citing literature); Margaret C. Wang et al., *The Need for Developing Procedural Accountability in Title I Schoolwide Programs*, in *HARD WORK*, *supra* note 279, at 175, 178–91; Weckstein, *supra*, at 324–41. By 1996, nearly 10,000 schools were registered as having failed to improve at rates required by the 1994 Act. See, e.g., Natriello & McDill, *supra*, at 32.

By all accounts, however, the Department of Education neither provided vigorous assistance to these persistently failing schools nor sanctioned them in substantial ways. See, e.g., Orfield & DeBray, *supra* note 279, at 4–9 (discussing the limited impact and spotty implementation of the 1994 reforms on the actual behavior of educators); Robert E. Slavin, *How Title I Can Become the Engine of Reform in American Schools*, in *HARD WORK*, *supra* note 279, at 86, 94; Weckstein, *supra*, at 317. The entire oversight of the program was assigned to a sixty-person unit within the Department, effectively leaving states on their own to address the problem. Orfield & DeBray, *supra* note 279, at 4–5 (concluding that, in administering the 1994 reauthorization, the Department “failed to fulfill the needed federal role, created no credible sanctions, and left the states on their own”).

431. See NCLB, Title I, Part A, §§ 1113–15, 115 Stat. 1469–78 (to be codified at 20 U.S.C. § 6311–15). Based on their proportions of low-income children, some schools qualify for funding for school-wide programs. See *id.* § 1114, 115 Stat. 6314. Others qualify only for programs providing services to low-income children within otherwise non-qualifying schools. See *id.* § 1115. Still other schools do not qualify for any funds at all, because the school’s proportion of children from low-income families is lower than the proportion in the district as a whole. See *id.* § 1113.

432. *Id.* § 1111(b)(1).

433. See *id.* § 1111(b)(3).

434. See *id.* §§ 1111(b)(2)(C)(v), 1111(b)(2)(G)(iii), 1111(b)(2)(I), 1111(b)(10). For thoughtful discussions of the diagnostic value of, but also the technical difficulties posed by, disaggregating educational outcomes and measuring success in regard to a variety of ethnic, socioeconomic and developmentally defined groups—and of the need, even given the disaggregation, to assure that individual children are not lost in the averages—see Thomas J. Kane, *Randomly Accountable*, EDUC. NEXT, Spring 2002, at 57; Lynn Olson, *Testing Researchers Make Pitches for Refining ESEA Rules*, EDUC. WEEK., Sept. 25, 2002, at 10; David Figlio, *Aggregation and Accountability* (Feb. 13, 2002) (unpublished manuscript, on file with NYU Review of Law & Social Change), available at <http://www.edexcellence.net/NCLBconference/Figlio.doc>; Richard J. Wenning et al., *No Child Left Behind: Who Is Included in New Federal Accountability Requirements* (Feb. 13, 2002) (unpublished manuscript, on file with NYU Review of Law & Social Change), available at <http://www.edexcellence.net/NCLBconference/Wenning.doc>.

435. NCLB, Title I, Part A, §§ 1111(b)(2)(B)–(G), 1111(b)(2)(I).

436. *Id.* §§ 1111(c)(1), 1111(h).

school districts meet these obligations to provide an adequate education to all subpopulations;<sup>437</sup> along with LEAs, provide technical assistance premised “on scientifically based research” to schools that have persistently failed to meet their AYPs, including through state-organized peer support teams of master teachers;<sup>438</sup> and provide academic achievement awards for schools that “significantly closed the achievement gap” between students from different ethnic groups.<sup>439</sup>

Each year, LEAs are required to use the results on the annual statewide standardized tests and other indicators to review the progress of each of their schools and each of the schools’ relevant subpopulations under the improvement criteria set by the state.<sup>440</sup> LEAs must additionally publicize and disseminate the results of the local annual review to parents, school personnel and the community so that educators at each level “can continually refine, in an instructionally useful manner, the program of instruction to help all children . . . meet the challenging State student academic achievement standards established under [the Act].”<sup>441</sup>

Schools that fail to meet their obligations must present a plan for doing so.<sup>442</sup> Parents and staff must actively participate in the planning process.<sup>443</sup> In presenting the Act, the Bush Administration has explicitly characterized it as a “‘flexibility for accountability’ bargain.”<sup>444</sup> The states receive substantial flexibility in combining funds received under various federal programs. In return, they must discipline schools and LEAs that fail to improve at an acceptable rate.<sup>445</sup> Schools that fail to meet their annual improvement goals for five years must be completely reconstituted under a restructuring plan that may include the engagement of private management companies to take over failing schools.<sup>446</sup> Schools that fail to meet state improvement standards for at least three of the four preceding years must permit low income students to use federal funds to which the schools and their LEAs would otherwise be entitled for supplemental education services from accredited public or private providers chosen by the students and their parents.<sup>447</sup> Students in schools that fail to meet state improvement standards for two consecutive years may transfer to a different public

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437. *See id.* § 1111(b)(2).

438. *Id.* §§ 1111(c)(3), 1111(c)(4), 1116(b)(4), 1117.

439. *Id.* § 1117(b)(1)(B)(i).

440. *See id.* § 1116(a).

441. *Id.* § 1116(a)(1)(C).

442. *See id.* § 1116(b)(3).

443. *See id.* § 1118(a)(1).

444. *See* U.S. Dep’t of Educ., The No Child Left Behind Act of 2001: Executive Summary, <http://www.ed.gov/offices/OESE/esaa/exec-summ.html> (last visited Nov. 22, 2003).

445. *See* NCLB, Title 1, Part A, §§ 1116(b), 1116(c).

446. *See id.* § 1116(b)(8).

447. *See id.* §§ 1116(b)(5), 1116(e).

school of their choice located in the same LEA, with transportation provided by the LEA.<sup>448</sup>

Just as the Texas reforms establish detailed obligations for schools and districts to report their performance and progress without establishing in corresponding detail the state's own responsibilities to monitor and foster these developments,<sup>449</sup> so the NCLB is virtually silent about the federal government's role in helping states pursue the goals of the Act and sanctioning them in case they do not. For example, in order to receive funds under the flexible provisions of the Act, the state educational agency must submit a consolidated plan setting forth how its challenging academic content standards, test regime, and other policies and practices will constitute and be implemented as "a single statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined [by the Act]."<sup>450</sup> The Secretary of Education has 120 days from the submission of the plan to convene a peer review process and, based on the peer reviewers' recommendations, demand necessary modifications.<sup>451</sup>

As many states will submit initial plans nearly simultaneously during 2003,<sup>452</sup> it is unlikely, except in cases of willful and blatant defiance of statutory provisions, that there will be anything like close scrutiny of states' proposals. Statutory provisions for subsequent review of plans deemed acceptable are nonexistent, and the Act has next to no discussion of enforcement. In case a state fails to meet any requirement of the new law, "the Secretary may withhold funds for State administration and activities under this part until the Secretary determines that the State has fulfilled those requirements."<sup>453</sup> The one exception is that "the Secretary shall withhold 25 percent of the funds that would otherwise be available to the State for State administration under this part" from any state that fails in a timely manner to put "in place challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress."<sup>454</sup>

The NCLB's enforcement thus is left almost entirely up to the discretion of the Secretary of Education. Yet, thus far, the Secretary's regulations have served

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448. *See id.* §§ 1116(b)(1)(E), 1116(b)(9), 1116(b)(10). The NCLB requires LEAs to use up to twenty percent of their Title I allocations to pay for transportation in support of choice options exercised by, or to fund supplemental educational services demanded by, students assigned to public schools that have failed to meet their improvement goals for the requisite period. *See id.* § 1116(b)(9).

449. *See supra* notes 250–67 and accompanying text.

450. NCLB, Title 1, Part A, § 1111(b)(2)(A). *See generally id.* § 1111.

451. *See id.* § 1111(e).

452. *See* letter from Sec'y of Educ. Rod Paige to State Educ. Officials 2 (July 24, 2002), available at <http://www.ed.gov/News/Letters/020724.html> (noting that "States will be required to submit their AYP for review at the beginning of 2003").

453. *See* NCLB, Title 1, Part A, § 1111(g)(2).

454. *See id.* § 1111(g)(1).

mainly to relax, not stiffen, the Act's monitoring and enforcement mechanisms.<sup>455</sup> That laxity is consistent with the Department of Education's (and the predecessor Department of Health, Education and Welfare's) regrettable history of weak enforcement of federal requirements.<sup>456</sup>

The Act's insistence on school improvement, in combination with its disinclination to monitor, let alone enforce, its own accountability provisions raises suspicions for some that the NCLB is a Trojan horse for nefarious political designs. Others, while not doubting the good faith of the Bush Administration and Congress, fear the legislation will have disastrous unintended consequences for the public schools and especially their poor and minority pupils. On the suspicious reading, the accountability-for-flexibility bargain that supposedly legitimates the legislation is, for one or another reason, a sham. One fear is that the states are getting flexibility without giving anything in return. In this view, the Act does little more than deregulate: By removing preexisting constraints on how federal funds may be spent, it delivers students, particularly poor and minority students, into the hands of selfish local oligarchs.<sup>457</sup> Another worry is that the standards and accountability system may have teeth but may not be intended to achieve reform. In this view, the NCLB's true purpose is to speed privatization by exposing the incapacity of schools and districts to meet their annual improvement goals.<sup>458</sup> The concerns about disastrous unintended consequences go to the capacity of the states and schools to advance reform under conditions established by the Act,<sup>459</sup> and to the fear that the Act will undercut

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455. See Lynn Olson, *Long-Awaited ESEA Rules Are Released*, EDUC. WEEK., Aug. 7, 2002; Erik W. Robelen, *Senate Panel Examines Ed. Department Efforts to Enforce New ESEA*, EDUC. WEEK., May 1, 2002, at 24; Diana Jean Schemo, *Schools Face New Policy on Transfers*, N.Y. TIMES, Dec. 10, 2002, at A26; see also *infra* note 472.

456. See, e.g., Michael Cohen, *Implementing Title I Standards, Assessments and Accountability: Lessons from the Past, Challenged for the Future* (Feb. 13, 2002) (unpublished manuscript, on file with NYU Review of Law & Social Change), available at <http://www.edexcellence.net/NCLBconference/Cohen.doc> ("No one believes the Education Department will really enforce Title I requirements. . . . The fact of the matter is that the Education Department does not have a strong track record of compliance monitoring in [Elementary and Secondary Education Act] programs, and hasn't for decades spanning Administrations of both parties. There is a widespread view that the Department has few effective sanctions to apply, since no one believes that it will ultimately withhold funds from states or local districts. [The Title I program] lacks both the staff capacity and clear focus to pay attention to the most important requirements."); *supra* note 430.

457. See, e.g., Dan Goldhaber, *What Might Go Wrong with the Accountability Measures of the "No Child Left Behind Act?"* (Feb. 13, 2002) (unpublished manuscript, on file with NYU Review of Law & Social Change), available at <http://www.edexcellence.net/NCLBconference/Goldhaber.doc>.

458. Inveterate opponents of public education consider that failure to be inevitable. See, e.g., Abigail Thernstrom, *Comments In Response to Papers* (Feb. 13, 2002) (unpublished manuscript, on file with NYU Review of Law & Social Change), available at <http://www.edexcellence.net/NCLBconference/Thernstromcomments.doc>.

459. See, e.g., Richard F. Elmore, *Unwarranted Intrusion*, EDUC. NEXT (Spring 2002), at <http://www.educationnext.org/20021/30.html>; Matthew Gandal, *Multiple Choice, How Will States Fill in the Blanks in Their Testing Systems?* (Feb. 13, 2002) (unpublished manuscript, on file with NYU Review of Law & Social Change), available at <http://www.edexcellence.net/NCLB>

the nation's remaining commitment to desegregation.<sup>460</sup> The deregulation and privatization worries about the Act do not, we think, bear much scrutiny. The reasons why that is so, in turn, help limit—although they do not fully banish—concerns about state and school capacity on the one hand and the effects of the NCLB on racial equality on the other.

Because it focuses so single-mindedly on long term consequences, the privatization reading overlooks the enormous and probably self-limiting political disruption that use of the accountability system to punish the public schools would almost surely provoke in the shorter term. Recall that the first obligation of LEAs with schools failing to meet their improvement goals is to afford their students the chance to transfer and to reimburse the costs of transporting them to another school of their choice within the district. Districts with poorly performing schools thus may be forced in effect to bus poor and minority students to the presumably richer and whiter schools in the district with better educational track records.<sup>461</sup> If all the schools in a district are failing, or the successful ones are likely to be swamped by transfers, the situation would be manageable only if limited to very few districts statewide. But the pressures released by the failure of schools in many districts statewide would be incalculably great—as was indicated by the ferment in a number of cities that accompanied the implementation of this part of the NCLB in its first year of operation.<sup>462</sup> Given the great flexibility accorded states in setting standards and

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460. See, e.g., John Charles Boger, *Education's 'Perfect Storm?' Racial Resegregation, 'High Stakes' Testing & School Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375 (2003). But see William L. Taylor, *Using Title I to Compel States to Provide Equal Educational Opportunity*, 81 N.C. L. REV. 1751 (2003).

461. See *supra* note 447 and accompanying text. For an argument that this provision provides a potentially strong tool for civil rights advocates, see Taylor, *supra* note 460.

462. See, e.g., Marjorie Coeyman, *Just When You Thought You Knew the Rules. . . : Schools Are Scrambling to Comply by Fall with a Slew of Demands, as the No Child Left Behind Act Turns the Status Quo Upside Down*, CHRISTIAN SCI. MONITOR, July 9, 2002, at 11; Derrick Z. Jackson, *The Big Lie: "No Child Left Behind,"* BOSTON GLOBE, Aug. 2, 2002, at A19; Robert Kelly, *Brooklyn Hopes that Parents Will Stick with the District*, ST. LOUIS POST-DISPATCH, July 17, 2002, at B1; Susan Levine, *Few Families Seek School Switch in Montgomery*, WASH. POST, June 22, 2002, at B1; Mary Lord, *The New School Choice: Suddenly, Thousands of Students Can Transfer*, U.S. NEWS & WORLD REP., Aug. 5, 2002, at 38 (noting that after "President Bush signed the [NCLB], vowing to free 'children trapped in schools that will not change and will not teach,' . . . students in 8,752 chronically low-performing schools . . . must weigh whether to jump ship in the next few days—while school districts scramble to accommodate thousands of students eligible to seize that option," including nearly 125,000 pupils in the Chicago district alone); Lori Olszewski, *Few Pupils Who Sought Switch Got Their Wish*, CHI. TRIB., Aug. 24, 2002; Michael Resnick, *'Choice' Cannot Be Rushed*, USA TODAY, July 9, 2002, at A14; Erik W. Robelen, *Few Choosing Public School Choice for this Fall*, EDUC. WEEK, Aug. 7, 2002; Jen Sansbury, *Obstacles Hold Kids in Bad Schools*, ATLANTA J.-CONST., Sept. 15, 2002; Megan Tench & Anand Vaishnav, *Payzant Faults Bush Plan as Impractical: Transfer Rule Called a Logistical Problem*, BOSTON GLOBE, June 12, 2002. The chancellor of the New York City School System, Joel I. Klein, recently committed the district to full "citywide" implementation of the NCLB's transfer provisions. See Press Release, Citywide Public School Choice Process, available at [http://www.nycenet.edu/press/02-03/n50\\_03.htm](http://www.nycenet.edu/press/02-03/n50_03.htm) (Dec. 9, 2002) (stating that the New York City "Department of Education will

annual improvement goals, the more likely response to this threatened dislocation would be to adjust one or both of these so that widespread failure, and the privatization to follow, does not occur.<sup>463</sup>

The deregulation reading, for its part, overlooks the possibility that there can be more to accountability than rule-following. Before the NCLB was enacted, school officials were in compliance with federal requirements if they could document, for example, that they had provided the number of hours of remedial education per pupil or of professional development per teacher that federal law required for schools receiving Title I funds. The grant of money in the absence of such rules, and hence of any efforts to verify compliance with them, looks like deregulation. But as we have seen both at the classroom level in New York City's District 2,<sup>464</sup> and in developments at both the classroom and district levels in Texas,<sup>465</sup> continuous, diagnostic monitoring of performance can provide a kind of accountability that not only identifies bad actors—something traditional rule-based accountability systems are competent to do—but also gives scope to experimentation and helps diffuse the better practices it reveals.

The NCLB plainly rests on these same foundations. The provisions for information to be presented in the annual state and LEA "report cards"<sup>466</sup> are as detailed as provisions for enforcement<sup>467</sup> (which immediately precede them in the statute) are scant. In addition to reporting the results of standard tests disaggregated by each of the relevant ethnic and socioeconomic subpopulations, the state report cards must compare the actual achievement of each of those subgroups to the state's annual goal for that subgroup. It must also report the percentage of students in each group not tested.<sup>468</sup> And it must require LEAs (mainly school districts) to do the same for themselves and for each of their

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establish a citywide public school transfer process for eligible children under the No Child Left Behind Act" that aims "to provide these [transfer] options in a more efficient, equitable and cost effective way").

463. Some such adjustment is already taking place. See Diana Jean Schemo, *Sidestepping of New School Standards Is Seen*, N.Y. TIMES, Oct. 15, 2002, at A21. But cf. *infra* note 471 and accompanying text (discussing limits on a state's ability to dilute its standards to the point where they have no diagnostic or incentivizing capacity). Sources arguing that large-scale privatization is unlikely for either political or economic reasons include James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002) (arguing that the preferences of the large numbers of families with children enrolled in suburban school districts pose a substantial political obstacle to the adoption of comprehensive educational choice plans because of their opposition both to giving up their current public school subsidy and to large-scale transfers of poor and minority children from urban schools to their own) and sources cited *supra* note 13 (arguing that full-scale privatization of the schools is likely to cost substantially more than the current public school system).

464. See *supra* notes 162–93 and accompanying text.

465. See *supra* notes 250–90 and accompanying text. See also *supra* note 214 (reporting similar results in North Carolina).

466. NCLB, Title 1, Part A, § 1111(h).

467. See *id.* § 1111(g).

468. See *id.* § 1111(h)(1)(C).



schools.<sup>469</sup> Consequently, the citizens in the state will be easily able to determine whether all the state's school children are progressing as desired, and whether some students are being excluded from the tests with the purpose or effect of improving scores.

Even more important, as is currently the case in Texas, parents and students will potentially be able to judge the performance of their school in serving families like them against the performance of demographically similar schools throughout the district and state. Moreover, as a result of the NCLB, parents and the public nationwide will be able to make more reliable judgments about the academic performance of individual states. Although the NCLB requires only that the state standards be "challenging,"<sup>470</sup> and the Secretary of Education is prohibited from imposing any particular standard on states as a condition for approval of its consolidated plan,<sup>471</sup> the Act takes an important first step towards establishing the comparability of state standards and their accountability systems more generally by requiring all states receiving Title I money (at federal expense) to administer the National Assessment of Educational Progress ("NAEP") in reading and mathematics to samples of fourth and eighth graders. If states standards are so low that all students are easily proficient, but a sample of these students shows poorly on this demanding national test, no one will be fooled.<sup>472</sup>

A far more substantial concern is that states, districts and schools will fail publicly, and with disastrous effects on the reforms under way, at the interlocking tasks of building an adequate school governance system and achieving classroom-level reform. Considering first the states' lack of capacity, only a few

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469. *See id.* § 1111(h)(2)(B).

470. *Id.* § 1111(b)(1)(A).

471. *See id.* § 1111(e)(1)(F).

472. *See id.* § 1111(c)(2); *supra* notes 191, 283–84 (discussing NAEP). Just for the Kids, a Texas intermediary organization discussed above, *see supra* notes 265–67, 271–73 and accompanying text, has already begun mapping proficiency levels as measured on state tests to the proficiency levels defined by NAEP. For example, Just for the Kids reports in regard to the Texas test for fourth grade mathematics that "the state's passing standard is comparable to the NAEP basic standard but easier than the NAEP proficiency standard." Just for the Kids website, at [http://www.just4kids.org/us/us\\_otherstates.asp](http://www.just4kids.org/us/us_otherstates.asp) (last visited Nov. 22, 2003). Also of interest in this regard is a "blistering letter" sent by federal Secretary of Education Rod Paige "to school commissioners across the nation warning against efforts to sidestep the intent" of the NCLB by dumbing down state educational standards. Diana Jean Schemo, *States Get Federal Warning on School Standards*, N.Y. TIMES, Oct. 24, 2002, at A25; *see* U.S. Department of Education, Letter Released from U.S. Education Secretary Paige to State School Chiefs on Implementing No Child Left Behind Act (Oct. 23, 2002), available at <http://www.nclb.gov/media/news/102302.html>. Confirming the weakness of the NCLB's formal enforcement mechanisms, *see supra* notes 449–56 and accompanying text, but also predicting—and taking steps to provoke—the public intolerance for weak standards and results that we anticipate, Secretary Paige called state officials who water down educational standards "enemies of equal justice and equal opportunity" and "apologists for failure," and forecast that "they will not succeed" because, "[o]nce parents discover that children in their local schools are not learning as well as they could, they will demand results—no matter how much one state tries to buck accountability." *Id.*

have accountability systems as sophisticated as those of Texas and Kentucky. As of early 2002, only sixteen states had the grade-by-grade tests that the NCLB requires in reading and mathematics. In only nine of those states were the tests aligned with curricular standards as the NCLB also requires. One estimate is that over 200 new state-level tests will have to be created in the next several years to meet federal requirements.<sup>473</sup> And of course without an adequate assessment regime in place, it will be hard for states to set proficiency levels and annual improvement goals as required by the Act. Given that the Department of Education is unlikely to provide much assistance to struggling states,<sup>474</sup> it is not unreasonable to worry that a governance-based reform will fail because the governance it supposes will not be in place to guide the reform.

The related worry about the lack of capacity for reform at the district and school levels grows out of the experience of the pioneers of the new classroom practices such as District 2, and is most compellingly articulated by careful observers of that experience such as Richard Elmore.<sup>475</sup> The fear here is that even good governance will produce reform only if schools and districts are already reforming, in the sense of having made some determination about the need to change themselves, and the direction change should take. As Elmore puts it:

[I]nternal accountability precedes external accountability. That is, school personnel must share a coherent, explicit set of norms and expectations about what a good school looks like before they can use signals from the outside to improve student learning. . . . Low-performing schools, and the people who work in them, don't know what to do. If they did, they would be doing it already.<sup>476</sup>

These are hardly frivolous worries. Many states will have a hard time putting in place an accountability system, and some will almost surely fail to do so within the limits imposed by the new law, however leniently interpreted. By the same token, many schools and districts will have trouble reorganizing to meet the demands placed on them by even by well-designed governance systems, and some will fail.

As inevitable as they are, however, these difficulties divert attention from the crucial questions: Is the NCLB so demanding in relation to the limited capacities of states and schools that its implementation is more likely to paralyze reforms in the more advanced jurisdictions than it is to help laggards advance? Will its implementation increase or decrease incentives for reform at the state and national levels? Answers to these questions are necessarily tentative. But the

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473. Gandal, *supra* note 459, at 1.

474. See *supra* notes 448–51 and accompanying text.

475. See generally Elmore, *supra* note 459. See also David K. Cohen & Susan L. Moffitt, *Title I: Politics, Poverty, and Knowledge*, in *THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION* 78, 87–88 (Ctr. on Educ. Pol'y, 2001).

476. See Elmore, *supra* note 459, at 33–34.

record of capacity-building detailed in the account of standards-based reform in New York's District 2 on the one side, and changes in school and district-organization in Texas on the other, suggest that resolutely pessimistic answers to these questions are premature, and even mischaracterize the obstacles to reform.

Consider first the concern with the cultural preconditions for change. The lesson of District 2 that emerges from Elmore's own work is that the culture of change is as much a product of change—including especially change in governance, or accountability, systems—as a precondition for it. District 2 might well have remained another case of anti-institutional or cultural, professional revolt but for the intervention of a new monitoring and assessment regime personified by key administrators such as reform superintendents Anthony Alvarado and Elaine Fink.<sup>477</sup> Moreover, the decision to adopt this regime was the starting point, not the conclusion, of change. District 2 is, as we saw, still figuring out "what to do"; its teachers and administrators do their figuring by trying different things and evaluating the results, not by deducing actions from settled cultural principles. For these reasons, as we have seen, District 2's leaders have had to engage in continuous exegetic exertions to establish that its institutional innovations remain consistent with the master culture of individualized attentiveness.<sup>478</sup> Indeed, given the vicissitudes of culture in District 2, and the overlapping experience of Deborah Meier in District 4,<sup>479</sup> it is legitimate to wonder whether a high level of traditional professionalism might sometimes obstruct reform more than aiding it.<sup>480</sup>

In any case, many of the consistently improving Texas districts do extraordinarily well at adopting the team-based diagnosis and response to individual learning difficulties that are key to District 2's success even though they are innocent of the latter's progressive tradition of pedagogy. More exactly, the Texas example admits of two interpretations, both of which suggest that there is not likely to be a show-stopping incapacity for ground-level reform. One is that the "cultures of reform" are more numerous and widely diffused than simple extrapolation of District 2 experience would suggest. We do not know how many the cultures or how wide their diffusion simply because we have not undertaken a comprehensive search for them. But given the diversity of the robustly improving Texas districts, it is unlikely that the list is short or the boundaries very narrowly drawn: Until they succeeded in improving, for example, the Texas school districts such as Weslaco and its Margo Elementary School were not on anyone's list of learning communities well-endowed for robust improvement.<sup>481</sup>

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477. See *supra* notes 142–44, 162–83 and accompanying text.

478. See *supra* notes 174–81 and accompanying text.

479. See *supra* notes 138–39, 174–81 and accompanying text.

480. See *supra* notes 141–45, 163–65, 185–88, 194–201 and accompanying text and especially note 186.

481. See SKRLA ET AL., *supra* note 274, at 11–13; *supra* notes 273–79 and accompanying text. See also *supra* note 214 (reporting similar findings in regard to rapidly improving schools and

A second, compatible interpretation is that it is wrong to think of capacity as a cultural endowment that is either present or not. Our analysis of Texas shows that many schools and districts are bootstrapping their way to systemic reform. Thus, changes in the framework of governance at the state level, such as improvement goals for racially and economically identified groups of pupils, provoke halting reforms at the school and district level, such as monitoring by principals of the implementation of curricular reforms in classrooms. The upshot is that not having “already” built a culture of reform, invested in professional development, or completed a blueprint for restructuring is not a disqualification for doing so. It does *not* mean that governance reform is self-effectuating in the sense that a once-and-for-all change of incentives at the top is sufficient to produce real reform at the bottom.

Elmore is right to emphasize the need for coordinated investments in professional development and other institutional change as conditions for the success of the reforms.<sup>482</sup> If we understand our case studies above correctly, however, they suggest that schools and districts may be at least as capable of making these investments correctly in response to the imposition of accountability regimes such as the NCLB as they are of making them effectively before such regimes are adopted.

A similar argument about capacity as a property emerging from the process of reform, rather than as a precondition for it, applies to state-level governance systems. The pessimistic view compares the current state-level governance capacity to the ideal envisioned by the NCLB at the point of full implementation and concludes that most states fall seriously below what is necessary. But if we are right that capacity can be built on the fly, the ideals of the Act are the wrong baseline for assessment. Instead, we should gauge the seriousness of the existing governance-capacity gap by considering states’ ability to improve their governance and accountability systems under circumstances in which that is required.

From this perspective, the situation is delicate but not dire. It is widely acknowledged, for example, that a sea change in state attitudes toward public education accompanied general acceptance of standards-based accountability. “In 1993 when the Clinton Administration took office,” writes Michael Cohen, former Assistant Secretary of Education in that administration, “only a handful of states were developing standards and aligned assessments . . . . Nine years later, every state is organizing its K-12 system around standards-based reform.”<sup>483</sup> By now there also is a substantial accumulation of expertise about how to deal with such technical problems of the new accountability such as year-to-year volatility in test scores and the unreliability of highly disaggregated data.<sup>484</sup>

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districts in North Carolina operating under the influence of that state’s highly developed accountability scheme).

482. See Elmore, *supra* note 459.

483. See Cohen, *supra* note 456, at 4.

484. See sources cited *supra* notes 120, 203, 434, 457.

At the same time, the successes of states such as Texas and North Carolina in implementing NCLB-style governance reforms have been widely remarked within the educational reform community.<sup>485</sup>

This combination of the states' growing general orientation towards standards-based reform, accumulating expertise in the use of diagnostic data, and leading examples of how to link classroom-level reform via attention to disaggregated diagnostic data to governance systems is likely to encourage rapid learning among new tiers of reforming states. This is especially likely to be true if, as we expect, the quality of testing and reporting in one state will be a goad to improvement in others. Just as the provision of information on school and district performance in Texas touched off a statewide movement for improvement of both, the hope is that the provision of equivalent information through the NCLB will touch off a mutually reinforcing race to the top nationwide in school governance and classroom reform.

In arguing that the NCLB may launch a race to the top, we do not mean to suggest that the law as enacted provides all that is required for a general and continuing improvement of education in every district and school across the country. All races produce losers as well as winners, even if we know too little about the enabling conditions of reform to predict who will place where. Moreover, as we note above, the NCLB provides little support for stragglers. As in the case of the corresponding legislation in Texas and Kentucky, however, the Act creates a framework that may well be corrigible in light of the experience it induces. Efforts to improve the Act's framework of enforcement and assistance in relation to lagging institutions could be in substantial part the work of the federal Department of Education or of public-private intermediary groups. Or it might emerge in response to community and legal pressure occasioned by public evaluation of schools, districts, states, and the federal government itself in the light of the new accountability systems. This public engagement may in turn provide new tools and a new direction for the Civil Rights Movement, while spurring the creation of the "countervailing power" among parents and communities and the "new publics" that we discuss above.

For starters, the federal Department, acting under its own steam, could periodically convene the states to review experience under their consolidated plans and to revise their standards, assessments and accountability systems accordingly. The Secretary of Education could report the results of this deliberation to Congress and explain how, through its own enforcement activities, the Department itself is drawing framework lessons from developments instigated by the NCLB. Such a process could in time lead the relationship of the federal government to the states to approximate the cascading relation of states to school

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485. On Texas and North Carolina, see GRISSMER ET AL., *supra* note 279 and accompanying text; sources cited *supra* note 215. For a careful analysis of the often considerable regulatory value of the release of comparative data on the harms and achievements of regulated entities, see Karkkainen, *Information as Environmental Regulation*, *supra* note 23.

districts, districts to schools, and schools to classrooms. In each case, the higher order unit creates a framework for the initiative of the lower-level ones and an infrastructure that allows the latter to revise the framework in the light of their pooled experience.<sup>486</sup>

Much of the information-pooling and reflection that such changes would make possible might also be achieved without direct action by the federal government. In Texas it is a private intermediary organization, Just for the Kids, that provides the most useful school-by-school and district-by-district data for parents and schools to use in building a constituency for reform. Just for the Kids also, as we saw, culls best practices from the successes of leading schools and districts.<sup>487</sup> Another intermediary organization, the EIN team at the Dana Center, links leading districts in a network that facilitates the kind of “inter-visitation” that amounts to rolling peer review.<sup>488</sup> Just for the Kids is making a determined effort to become a national provider of detailed comparable information on school performance in the states and to monitor the quality of state tests by comparing their results to those generated by the most advanced assessment tools.<sup>489</sup> *Education Week* publishes annual report cards on state education policy, student performance and standards and accountability systems,<sup>490</sup> and academic comparisons of state accountability and assessment systems are also being published.<sup>491</sup> Presumably, these and other rating bodies will compete to command national attention and the resources that go with it.<sup>492</sup> A variety of national

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486. For thoughtful convergent views of the possible reorientation of the federal role in educational reform and a concomitant use of its enforcement policies, see Weckstein, *supra* note 430, at 314–18; Wang et al., *supra* note 430, at 177.

487. See *supra* notes 265–67, 273–74, 471 and accompanying text.

488. See *supra* notes 270–72, 274–81 and accompanying text.

489. As the home page of the website of Just for the Kids explains, the organization “analyze[s] state test data to identify how well individual schools are performing[,] . . . stud[ies] the highest-performing schools to find out what works” and develops “tools and instruction [to] help others replicate educational best practice.” Just for the Kids, [http://www.just4kids.org/us/us\\_home.asp](http://www.just4kids.org/us/us_home.asp) (last visited Nov. 22, 2003). The organization’s website already lists the additional information that each state needs to collect to make Texas-style reporting available there. See, e.g., Just for the Kids, <http://www.just4kids.org/us/newyork.asp> (last visited Nov. 22, 2003). See also *supra* note 472 (discussing Just for the Kids’ efforts to monitor the comparative quality of state tests).

490. See, e.g., Lori Meyer, *Quality Counts 2002: The State of the States*, EDUC. WEEK., Jan. 10, 2002, at 68.

491. See, e.g., Margaret E. Goertz & Mark C. Duffy, *Assessment and Accountability Across the 50 States*, in CPRE POL’Y BRIEFS (Consortium for Pol’y Research in Educ., RB-33, May 2001) (presenting detailed comparisons of states based on how they measure student performance and report it to the public, how they hold schools and districts accountable for student outcomes, how well they have aligned their accountability systems for Title I and non-Title I schools and how they assist low-performing schools).

492. For analogous competition among forestry codes and the learning that occurs through detailed comparisons of their features as judged by users, see CATHERINE M. MATER ET AL., PRICE CERTIFICATION ASSESSMENTS ON PUBLIC & UNIVERSITY LANDS: A FIELD-BASED COMPARATIVE EVALUATION OF THE FOREST STEWARDSHIP COUNCIL (FSC) AND THE SUSTAINABLE FORESTRY INITIATIVE (SFI) PROGRAMS (2002), available at [http://www.pinchot.org/pic/Pinchot\\_Report\\_](http://www.pinchot.org/pic/Pinchot_Report_)

analogues to EIN networks linking high-performance districts and state education agencies may also emerge and compete with the rating agencies as providers of best practices and performance benchmarks to educators and the public.

Provision of services by non-governmental organizations may arise from and contribute to grassroots engagement of parents and students in school reform on the models of the O'Hearn experience in Boston and the Community Accountability Team in Louisville.<sup>493</sup> Locally, these movements can increase pressure on particular schools and districts to improve to levels achieved by comparable institutions elsewhere. Moreover, as the connection of Louisville's Community Accountability Team to the Kentucky-wide Commonwealth Leadership Institute and the Prichard Committee suggest, local movements can go hand in hand with campaigns for reform of statewide accountability systems.<sup>494</sup> More broadly, proliferating efforts across the country to link school reform efforts to community organizations suggest that a series of horizontal coalitions connecting reforming schools and districts in different cities and states may form and intersect with vertical alliances connecting local reform with more encompassing efforts. The Cross City Campaign, the Research for Democracy Project and the Citizens' Civil Rights Commission are examples.<sup>495</sup> Together or separately, these new publics could pressure the federal Department of Education to take a more active role in monitoring school reform under the NCLB than the legislation now mandates, or to partner with some of the new entities that are already operating. If the government fails to act, a national coalition of these organizations—catalyzed perhaps by groups like the Washington D.C.-based Citizens' Civil Rights Commission—could urge Congress to amend the NCLB to require it to do so.

As we began to suggest above,<sup>496</sup> these political remedies for the NCLB's enforcement defects could be greatly augmented if an array of enforcement opportunities opened up by modern accountability systems were used to update and transform the Civil Rights Movement's litigation strategies. One potential strategy builds on the tradition of private litigation by aggrieved parties vindicating civil rights under the Fifth and Fourteenth Amendment's equal protection provisions and Title VI of the Civil Rights Act of 1964, which forbid racial discrimination by recipients of federal funds.<sup>497</sup> Under both the Equal Protection Clause and Title VI, privately enforceable claims require proof that, as a result of *deliberate* discrimination, a minority group has suffered harm from the racially disparate impact of a government policy.<sup>498</sup> Proving intentional

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493. See *supra* notes 404–07 and accompanying text.

494. See *supra* notes 406–07 and accompanying text.

495. See *supra* notes 398–402, 408–09 and accompanying text.

496. See *supra* notes 410–28 and accompanying text.

497. See 42 U.S.C. § 2000d *et seq.* (2000).

498. See *Alexander v. Sandoval*, 532 U.S. 275, 280–81, 285–86, 293 (2001) (limiting private

discrimination directly is nearly impossible. Bigots with official responsibility rarely are foolish enough to make bigotry an express motive for their official acts. In most cases, therefore, racial animus must be proved circumstantially. Officials may be found to be deliberately discriminating if they adopt policies with a racially disparate impact when they know of, but ignore, at least equally beneficial alternatives to the chosen policy that would have avoided or moderated the disparity.<sup>499</sup>

The accountability systems established by the NCLB could, we think, facilitate such circumstantial demonstrations of intentional discrimination. Until now, circumstantial claims of racial discrimination seemed almost necessarily conjectural. Courts could never be sure there was a feasible alternative to the impugned policy that would nearly equalize the benefits of a government service to all protected groups. But the whole thrust of NCLB accountability is to make the public and school officials alike inescapably aware of just such proven equality-enhancing alternatives. Under the NCLB, schools and districts are required to bring all sub-populations of students up to a state-defined level of educational adequacy, and improve the performance of those sub-populations at a threshold rate defined by state law. States, in turn, are required to divide schools and districts into similarly situated cohorts (ones with racially and socio-economically comparable student bodies), and publicly identify the institutions in each cohort that do and do not satisfy those adequacy and improvement requirements. Given these mandates and the information they generate, the most difficult burden will no longer be the one on the plaintiff class of minority children to show that school officials willingly ignored policies and practices that are demonstrably superior based on the school system's own criteria. Information generated by the state's accountability system will do this for the plaintiffs. Instead, the most demanding burden will be the one the administrative scheme itself places on persistently poorly performing schools and districts: to explain to courts and administrators why they have not been able to meet the state's own adequacy and improvement goals for their students when schools that the state and federal legislatures have formally defined to be similarly situated (ethnically, economically, and the like) are able to do so.<sup>500</sup>

The NCLB may also smooth the way of plaintiffs pursuing relief through two additional causes of action under which a showing of "disparate impact,"

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actions under Title VI to deliberate discrimination); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (limiting actions under the Equal Protection Clause to deliberate discrimination).

499. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 622–27 (1982); *Dayton Bd. Of Educ. v. Brinkman*, 443 U.S. 526, 536 n.9 (1979); *Columbus Bd. Of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–68 (1977); *Davis*, 426 U.S. at 241–43; Liebman, *supra* note 29, at 1576 n.483, 1614–35 (citing lower court cases). See generally John Benjes et al., *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964*, 15 HARV. C.R.-C.L. L. REV. 537, 600 (1980).

500. This same argument works to the advantage of minority plaintiffs in suits filed under state analogues to the federal Equal Protection Clause in states—the majority—where such provisions require proof of intentional discrimination.



regardless of official intent, is sufficient to establish liability. The first cause of action is available in suits brought by the United States Department of Education to enforce its longstanding regulations permitting the government to withhold federal funds from schools, districts and states whose programs have a harmfully disparate impact on minority children.<sup>501</sup> The Supreme Court has explicitly left this power intact and invited the Department to continue applying it through lawsuits and administration enforcement actions.<sup>502</sup> The second cause of action is available in those states—a minority—where disparate impact is an alternative basis for relief under their Equal Protection Clauses.<sup>503</sup>

The typical response of defendant officials in disparate impact cases has been to claim that uneven outcomes are the result not of state action or inaction but of the “oppositional behavior” of poorly performing students and the inadequate endowments of their families and communities. Under the NCLB, however, state actors are required to acknowledge their responsibility to enable all subpopulations of students to reach threshold levels of performance and ongoing improvements. Moreover, claims by schools and districts that they cannot do so for reasons that inhere in the social and economic status of their students—and thus are beyond public control—will in many cases be disproved by data the NCLB now requires the states themselves to collect. Achievement of better outcomes by other institutions in the state with identical cohorts of students (as defined by authoritative federal and state criteria) will create at least the presumption that it is not the children, parents and communities that are to blame for the failing institution’s outcomes, but instead the institution’s corrigible educational practices.

In celebrating the adoption of the NCLB, the Bush Administration characterized the statute as an attack on the “soft bigotry of low expectations” and “commit[ted the Government] to eliminating the achievement gap, not hiding it within statewide averages.”<sup>504</sup> In keeping with these undertakings, the Act potentially eviscerates many of the traditional defenses to racially disparate outcomes. These undertakings would also seem to place a special responsibility on the Department of Education to interpret and enforce its NCLB and Title VI regulations in this spirit.

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501. See *Sandoval*, 532 U.S. at 281–82 (citing and discussing the relevant regulations).

502. See *id.* at 289–91.

503. See, e.g., *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996) (holding that Connecticut has an affirmative responsibility under the state’s constitution to remedy segregation in public schools regardless of whether segregation has occurred de jure or de facto); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1144 & n.60 (1999) (citing cases); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 844–54 (1998) (discussing interpretation of the equality provision in New Jersey’s Constitution); Robin Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 301 (1977) (citing cases).

504. U.S. Dep’t of Educ., *Reaching Out . . . Raising African American Achievement—No Child Left Behind*, [http://www.nclb.gov/start/facts/achievement\\_aa.html](http://www.nclb.gov/start/facts/achievement_aa.html) (visited July 30, 2002).

The same logic applies in spades with respect to suits premised on a state constitutional right to an adequate education.<sup>505</sup> We saw earlier how rulings in Texas and Kentucky solve the justiciability problem long associated with claims for adequate levels of education.<sup>506</sup> The NCLB now makes it incumbent on *all* states to define educational adequacy, to specify and measure sufficient progress towards it, and to make (via the accountability system) institutional corrections when progress is insufficient. Each step states take to comply with these requirements provides plaintiffs in failing schools and judges adjudicating their claims with the definition of an adequate education and with effective ways to achieve it. By requiring states to provide that definition, the NCLB again removes what in the past has been a major obstacle to successful adequacy suits.<sup>507</sup>

Finally, this change of evidentiary contexts may invigorate private tort claims in education that have proved singularly unsuccessful until now. Modeled on medical and legal malpractice suits, these actions typically have sought monetary damages based on claims that individual teachers and principals breached professional duties of care by, for example, authorizing a functionally illiterate student to be passed up through the grades and awarded a high school diploma.<sup>508</sup> Courts almost always rejected these claims on the grounds that in teaching, unlike in medicine and law, there is no settled view—not even within particular communities—as to the due standard of care.<sup>509</sup>

Again, however, the whole thrust of the classroom-level reforms prompted by the NCLB and the New Accountability is precisely to establish local and statewide standards of professional care, even as the focus of responsibility shifts from individual teachers to more encompassing institutions. It is conceivable, therefore, that a new generation of educational tort claims might be used to obtain injunctive relief from failing educational institutions. To underscore the legitimacy and utility of these standards, these suits might refer directly to the NCLB, to the obligations that states assume in accepting funds under it, or to state legislation or regulations adopted to implement those obligations.

For each of these litigation strategies, the NCLB and associated state reforms provide the same compelling enforcement logic: Failing schools and districts are now required by federal and state law to learn from other institutions that are demographically like themselves but are doing better. If they persistently fail at this manifestly feasible task, they are reconstituted.<sup>510</sup> An equivalent logic can also be applied to *state* educational administrations that are found to be similarly failing in whole or in part.<sup>511</sup> Linking wrong to remedy in this way

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505. See *supra* notes 82–89, 234–46, 296–97 and accompanying text.

506. See *supra* notes 422–24 and accompanying text.

507. See Liebman, *supra* note 94, at 385–97.

508. See generally John Elson, *Common Law Remedy for Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641 (1978).

509. See Liebman, *supra* note 94, at 385–97.

510. See *supra* notes 250–66, 334–36, 430–48 and accompanying text.

511. See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); Helen Hershkoff, *School*

avoids, as we saw, the problem of judicial discretion that that led the Supreme Court in *Jenkins v. Missouri* to curtail expansive, exploratory school reform in the school desegregation context.<sup>512</sup> Under accountability systems such as those required by the NCLB, therefore, court orders determining rights and remedies under conditions of non-court-centric judicial review promise to be both more encompassing and yet less intrusive than traditional decrees in earlier phases of educational reform litigation.

### CONCLUSION

With these last considerations, our argument has come full circle. We began with an examination of the limits of desegregation and traditional finance equity litigation. We then saw how the commingling of a top-down movement for standards and a bottom-up movement of professional protest focused on the classroom produced a reform model—and a method of non-court-centric judicial review—addressing many of the problems of educational inadequacy, particularly in relation to poor and minority pupils, that desegregation and allied litigation had left unsolved. Last, we traced the generalization of this reform, through the No Child Left Behind Act of 2001, from the state to the national level. We argued that the accountability mechanisms established by the statute, in combination with broader political movements and non-court-centric judicial review, could be used to cure many of the Act's insufficiencies.

But have we come full circle back to the hopes and aspirations of the early Civil Rights Movement? Can this new movement be thought of as the legitimate legatee of the concern for equal treatment in a diverse society that motivated the earlier and heroic attempts to recast the school system? Or, on the other hand, have crucial values and goals that inhered in the original Civil Rights Movement and made the federal courts and government the champions of equal respect for all citizens been lost along the way?

In concluding we want to argue the former. The new standards-based reform movement, we believe, provides an attractive way to deal with the realities of race in the aftermath of desegregation. It acknowledges the limits of equal protection commended by sustained reflection on the complexities of cohabitation in a multicultural society while making difference itself both a crucial instrument for addressing apparently prosaic problems of public problem-solving and an Archimedean point from which we can in time redefine who we are.

In the aftermath of desegregation, the United States has come to understand itself as a racially mixed, multicultural society. On the one side, the rejection of explicit segregation is now a deeply entrenched value in our society. On the other, judicial grappling with desegregation revealed the impossibility of trans-

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*Finance Reform and the Alabama Experience*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 24 (Marilyn Gittell ed., 1998).

512. See *supra* notes 425–26 and accompanying text.

lating the ban on segregation and closely related forms of discrimination into an unambiguous and operable program of deracialization of schools and other public institutions. The recognition of this irreducible ambiguity does not, however, end discussion. On the contrary, the abiding commitment to assure that segregation and other forms of discrimination are not continuing or reintroduced where they were once extirpated obligates us as a nation to constant vigilance, lest the fact of racial difference result in constitutionally unacceptable differentiation in the treatment and social endowment of citizens. Like it or not, the continuing open consideration of race and its effect on life chances has become a constitutive part of who we are.

We know from bitter experience just how difficult and self-defeating the debate over the fundamental attributes of equal protection can be. We know, for example, that separation or separateness can sometimes be inimical to, and can sometimes be a precondition for, the acquisition of wider solidarities, and that it can be nearly impossible to tell the two cases apart from a distance. We know, as well, that the imposition of democratic values, including even the value of respect for individual autonomy, can itself constitute a democratically impermissible and self-defeating intrusion into the lives of the members of sub-national groups. Together, the recognition of the ambiguity of the cohesion of sub-national groups, and the respect due the values of others in a liberal democracy, counsel restrained use of state authority even in the service of the deep goals of equality. Hence the resigned consensus of recent decades: Once the worst excrescences of discrimination have been effectively outlawed, we don't want the state—in the schools or elsewhere—regulating the fine details of our association, undermining the social basis of our toleration, and denaturing our constitutional values in a vain effort to spell out which groupings in the long run encourage inclusion and which are antithetic to it.<sup>513</sup>

A chief advantage of the standards-based reform movement is that it respects this concern for restraint while still advancing the national self-interrogation on race in relation to effective equality and schooling that our commitments obligate. The new reforms are able to square this circle precisely because of the bargain they strike between enhanced local autonomy in return for increased supra-local accountability. The power of initiative increasingly accorded to classrooms, schools and districts allow local groupings to address problems from the concrete standpoint of their activity and associations. Indeed, if participation in such governance is for now largely a matter of professional self-criticism and renewal, it may in time spark or fuse with a new kind of direct local democracy, where citizens decide the rules by which they live without, or

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513. Many participants in recent debates about multiculturalism are less resigned about the possibilities of the use of state power than this summary might suggest. We present the debate at its most pessimistic both because it is in the main conducted on the defensive—with a profound sense of the contradictions inherent in using state power to assure individual autonomy—and because, more importantly, we want to show that the current reform movement could pass muster even when judged in the light of apparently fatalistic conclusions.

at least with less, mediation by representatives. But because their organizational choices are subjected to comparative scrutiny, their articulation of their own identity cannot come at the expense either of minorities within their midst or, if the group is homogeneous, at the cost of withdrawal from the surrounding community.

Take first the danger of a group's withdrawal from the larger community. Consider a caricatural example in which a group is committed to a form of comprehensive schooling that inculcates blind obedience to authority rather than the generally critical, liberal values held by the larger society. Recall that under the new reforms, all students, including those in the school for obedience, will have their performance measured on certain statewide or comparable tests. If the capacity for autonomous problem solving is valued in the larger society, the test will reflect those values and schools that (improbably) succeed in crushing autonomy will show poorly on it, and suffer the consequences. Similarly, schools wholly absorbed in the history and culture of one group to the exclusion of all others will do poorly on tests that require more general knowledge. Thus, acceptance of standards—the precondition for increased local autonomy—sets limits to the school's isolation and obliges at least a minimal level of engagement with the outside society. We cannot say for sure that this engagement—in the form of a capacity for autonomous problem solving, or knowledge of other cultures, or whatever—is enough to ensure an effective schooling for democratic citizenship. But the multiculturalists are right to be skeptical of anyone who claims to know how to do that.

The discipline of general standards also protects minority subgroups. The example of Texas shows how reporting and ranking systems can be designed to make improvement in the performance of sub-populations a crucial measure of the success of schools and school districts. Here too we have no final assurance that the level of engagement will be sufficient to remedy wrongs. What can be said is that abuses will not be hard to find, and, more important, that the measure of what counts as intolerable neglect of sub-populations will be continuously raised as the successes of the leading schools in addressing this problem reshape the standards by which others are judged.

This very last remark aside, we have focused so far on the harms of political intrusion that the standards-based movement can arguably avoid. Provisional assurance on this point is important, but should hardly count as a decisive argument in favor of the reforms and the novel collaboration between courts and social actors on which they are based. It may well be that traditional constitutional review can serve such defensive purposes as well.

The decisive advantage of the new reforms and the associated reorientation of the American legal process is, rather, to combine such restraint with a far-ranging public and institutionally consequential interrogation of matters of race and equality that would otherwise be impossible. In this sense, the deep significance of standard-setting, peer review and many other forms of

information pooling is not to prevent abusive self-absorption by individuals or groups but rather to bring to light new forms of participation and joint problem solving that meet the needs of individuals with their group attachments—providing them, for example, with an adequate education—and at the same time reshaping incrementally but powerfully our understanding of how different groups can learn together and from each other. Many of these new forms of participation and problem solving will constitute or suggest new ways of living, and some will call into question conventional social values. In this sense the institutionalization of standards-based reform, and the new collaboration with other branches of government creates an engine of non-conformity, if not of incrementalist insurgency against the status quo.<sup>514</sup>

Put another way, the chief virtue of the new reforms is to transform diversity and difference from an obstacle to the fruitful investigation of possibilities to a means for accelerating and widening such inquiry. Comparison of different projects for school reform by teams that are themselves diverse in their composition (local school councils, peer evaluators, standard-setting bodies and so on) makes it possible to examine each proposal both in the mirror of the alternative projects and from the varying angles presented by different, specialized points of view. This kind of examination has been shown in many settings to bring to light deep flaws in individual projects that remain long undetected when they are pursued in isolation, and to reveal novel possibilities that are missed when many projects are pursued simultaneously but in willful indifference to each other.<sup>515</sup> Again, the weightiest effects of this problem-solving diversity are higher order: It is less the immediate problem solved than the ramifications and generalizations of new techniques and principles contained in the solution that in the long run produces the profound effect on the actors' and the institutions within which they operate.

Seen as a whole, then, the new standards-based movement has resolved a daunting impasse—how to reform schools given the exhaustion of both the privatization and bureaucratic public school models—while bringing the emerging implications of experimental reform to the attention of the public in a way that assures accountability and provokes further reflection. The reform movement gives new meaning to the question of diversity amidst the give and take of the most local of local politics, school politics, while connecting school reform to a possible reorientation of the constitutional judiciary and the

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514. See Jeremy Waldron, *Mill as a Critic of Culture and Society*, in JOHN STUART MILL, ON LIBERTY 224 (David Bromwich & George Kateb eds., 2003) (arguing that John Stuart Mill thought that something like an engine of non-conformity was required to assure freedom of expression and individual self-development in democracy).

515. See, e.g., Susan Helper, John P. MacDuffie & Charles F. Sabel, *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, 9 INDUS. & CORP. CHANGE 443 (2000). See also MARTIN VANCREVELD, *COMMAND IN WAR* (1985); Todd LaPorte, *High Reliability Organizations: Unlikely, Demanding and At Risk*, J. OF CRISIS AND CONTINGENCY MANAGEMENT, 4, 2 (June 1996), 60–71. For an application to learning in schools, see JOHN BRUER, *SCHOOLS FOR THOUGHT* (1993).

American legal process more broadly. It commands attention as an innovative response by civil society and the courts to the remaking of the schools and more generally to the unfinished business of providing citizens with an adequate supply of those basic goods required for participation in our democracy.